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THE SENTENCING POWER IN CRIMINAL CASES

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Mechanics and Farmers' Bank of Albany

THE SENTENCING POWER IN CRIMINAL CASES

By Francis Bergan*

The purpose of every system of criminal law, and of every prison and correctional program is the protection of the order and security of society. The true test of the value of the methods by which criminals are apprehended, prosecuted and punished is the extent to which the methods followed succeed in actually protecting society. The problem is related to other public questions: to economic and social opportunity; to living conditions; to education and to conditions of mental and physical health.

But crime is a special social problem in itself. It exacts enormous charges on the human resources and on the economy of modern society running annually in the United States to billions of dollars. The techniques in dealing with it are in acute need of fresh evaluation.

How best to protect society against crime has undergone a long period of evolution. In the Middle Ages it was felt that retribution against the offender was an adequate and effective way to protect society. The techniques were often physically brutal; but in that society they were regarded quite generally as appropriate.

Stemming from the experience in dealing with crime in the Middle Ages, there grew up in England from the 16th to the 18th centuries, as a part of the development of the Common Law, a new concept in the protection of society and in the treatment of criminals. A policy of extreme severity was followed. A large catalogue of offenses was punishable by death. Even petty thievery and offenses that are usually regarded as quite nominal were the objects of capital

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punishment. English criminologists call this period one of "criminal law by terrorism" because there is no doubt that terror was an important component in its philosophy.

It had strong advocates in high places like the Reverend Sydney Smith, who cogently argued its utility. But it failed to protect society. It did not work. Its theory was not demonstrated in practice. Dramatic proof of this was given when Parliament, late in the 18th century, began investigating its utility, and its committee reported the large incidence of pocket-picking in the crowds gathered to see the public hanging of pickpockets.

The severity of this penal system had an interesting and well-known effect on the judicial administration of criminal law. A sense of humanity led the judges to a policy of amelioration. The trial judge gave to the unfortunate offender the compensatory benefit of a maze of technical safeguards. That, too, was regarded as appropriate to the special problems raised by extreme severity of the penal system. But it grew up at a time of great formative influence on American law in its inception and many of its technical mechanisms, now obsolete, continue.

The system of terror was abandoned because it did not work. In its place was substituted a new concept. This was that the penal system was to attempt to deter the criminal. The punishment should serve as an example to others. The punishment was made "to fit the crime." It was, in theory, made applicable alike to all offenders. The factors of individualism: age, mental capacity, social and economic background, were not weighed in. The system was characteristic of the 19th century in which it grew up. The automatic working of certain "laws" in the fields of economics, sociology, and politics was widely accepted.

Given a particular crime and an appropriate sentence, the deterrent effect would be automatic. It was characterized by rather long periods of penal servitude, to which in England, but not the United States, must be added transportation to penal colonies. The utility of the deterrent value of long incarceration and penal servitude was very widely accepted, and there runs through the fabric of the legal thinking of New York a constant thread of this philosophy in the judicial

opinions of the judges of all our courts over the last hundred years or more.

But by the beginning of the 20th century a realization of the inefficiency of this system of deterrence by long penal servitude as an effective means of protecting society against crime began to be felt and became demonstratable. It was known to be especially wasteful of human values and of human resources. Reformation of the offender was no part of it. A singularly pessimistic view of its operation was taken by Sir Godfrey Lushington, under-secretary of State for Home Affairs in England, based upon a long and intimate experience with the operation of the English penal system.

Appearing in 1895 before the Gladstone Committee investigating the entire prison organization, he said: "This treatment is not reformatory. I consider that a medieval thief who had his right hand chopped off was much more likely to turn over a new leaf than a convict who has had 10 years of penal servitude. I regard as unfavorable to reformation the status of a prisoner throughout his whole career; the crushing of self-respect; the starving of all moral instinct he may possess; the absence of all opportunity to do or receive a kindness; the continued association with none but criminals; the forced labor and the denial of all liberty."

The last 50 years have witnessed a critical evaluation of the utility to society of these successive systems. The conclusion they have not succeeded in their purpose has been widespread in all countries. There has evolved from this experience the thesis that a more workable way to protect society is to fit the treatment to the individual; not the punishment to the crime; to attempt to learn the causes of his offense by skillful and experienced study and judgment; by re-education where that is possible so that his skills and talents can be utilized in the interests of society instead of toward its destruction, with the purpose that as a result of the treatment he receives he may become useful to society. The concept of "treatment" has replaced the concept of "punishment."

As part of this, measures are to be taken to correct physical handicaps; to treat, as far as they may be treated, mental disorders which have contributed to delinquency; and to train delinquent mental defectives for tasks in society within their abilities.

The total man in his total background is to guide the judgment of what treatment is appropriate for him. The basic concept is not mere sentimentality. And it is not weakness. In cases of persistent offenders not amenable to known techniques of re-education and training, it may involve very long periods of treatment under detention. In others the treatment may involve little or no incarceration but the utilization of other forms of supervised training and re-education.

The thesis of modern criminology is humane; but it is based on utility with the purpose of how most effectively to protect society against crime. It is founded on a hard core of hard experience. Its proponents suggest that it is the most economic method of criminal law, in terms both of money and in the conservation of the human resources of the community.

If all this be true there are factors to be considered when a man stands convicted of crime before the bar of a criminal court for sentence much more broadly based than are now available to the trial judge.

There ought to be adequate and expert appraisal of the causes of his offense; his intelligence; his attitude toward society and toward his offense; his physical and psychological soundness; a full study of his life and experience, not limited to a mere recital of his previous "convictions;" his talents and aptitudes and the extent to which they are used and usable; his educational and social background and his aims and purposes. There must also be skilled judgment of the kind of treatment necessary for him and a thorough knowledge of the resources of the state system and the availability of facilities in which his re-education can effectively be carried out.

Much of this requires judgment in fields outside the range and scope of the technical legal training of judges; and few judges are adequately equipped for weighted evaluation of these factors. If the lessons that have been learned in modern studies of crime can be applied effectively to the protection of society the decision as to what treatment should be followed for the man convicted in court of a crime should be left with some agency of the state other than the trial judge. The judgment that should be given by the court after con-

viction in all cases should be merely that the prisoner be committed to the control of an agency of the state equipped to provide the treatment appropriate for him.

Upon his commitment to the custody of the agency, a total study of the man by thoroughly trained specialists in the fields related to his problem should be made. The treatment to be followed should be based on these studies. Certainly it is apparent that expert studies of this intensity cannot, even under the most favorable circumstances, now be made in the numerous and widely separated and widely different criminal courts of the state. Consistency of treatment on a state-wide basis, now sadly lacking in the light of greatly divergent views of judges in different courts and in different localities would be one desirable result of the establishment of such an agency.

An agency exercising this kind of power in the penal system of the state would incur public responsibility of the very first magnitude. The selection of its personnel, able, unprejudiced, enlightened, humane, unsentimental, independent, careful and diligent, would become one of the great administrative problems of the government and it would become a very diffcult and challenging problem.

In the first place, the agency should be intimately acquainted with the correctional system of the state and with all its facilities and services, but it should not be a part of the correctional system. Since some system of parole would be a very important part of the treatment it would provide, it must have thorough knowledge of the parole facilities. The agency should not have an institutional flavor. On the other hand, the correctional system should be represented in its personnel. Since the sentencing power is traditionally and has, in some part, constitutionally, always been treated as a judicial function, it would be desirable that experienced judges should be components in the agency. And since the practical experience of police and prosecuting officers is needed to make any penal system work, those branches of the government should be represented.

But it should be at the antipodes from prejudice, local or general, and its work must be done objectively with the sole aim in mind of the overall protection to society in the treatment it undertakes. Perhaps it might best be organized by

the assignment to it from time to time by the Court of Appeals of experienced justices of the Supreme Court and of the County Court selected from the state at large and composing a majority of its personnel, with representation of the Department of Corrections; the Department of Social Welfare, the Division of Parole, and the district attorneys, again selected on a state-wide basis and assigned by the governor.

In addition to determining the nature of the treatment to be afforded to convicted criminals, the agency should be required to review freshly, and at stated intervals, the situations of persons whose incarceration has for one reason or another been continued beyond average periods. It would probably have the person whose case it was considering personally before it initially and from time to time.

In some instances the initial studies and reports might not furnish sufficient data, and actual experience with the person either in an institution or under conditions of supervision on parole might be necessary to formulate its judgment. It would probably review fairly often the cases of persons in institutions as the parole board does now persons eligible for parole.

Parole as a system of treatment and re-education of criminals would continue to be an increasingly important function of the system, but the determination of the time of release would be absorbed by the agency. Its power would extend to all classes of offenders, the youth, the mentally defective and the insane, as well as to the mentally normal adult offender.

The establishment of such an agency with powers so broadly based suggests a revolutionary change in the system of criminal law of the state. But there is no doubt that the history of the penal systems of this country and elsewhere in the last 200 years indicates clearly that the eventual establishment of some such agency with powers of this kind is essential to the development of an effective modern penal system, and that inevitably the State of New York will adopt a method of this type for the treatment of offenders.

There is, however, a strong brake of conservatism against change in all systems of law; and, indeed, stability is one of the desirable elements of any good legal system. It is in the

tradition of American law that changes are made gradually, often falteringly, and that the progress of the law is slow. It is essentially pragmatic in philosophy.

There are, additionally, some objections on the merits to the proposal which need to be met in one way or another before its public acceptance could conceivably be possible. One of the first and most legitimate objections to the system would be the difficulty in getting the right personnel to do its work, and enough of the right personnel. It would require groups of sociologists and psychiatrists and psychologists, social investigators and other specialists in strikingly greater numbers than we are accustomed to deal with in our present establishment. They would be expensive and a heavy strain would be placed upon the civil service. But unless there can be thorough individual studies and full investigations of each offender made by competent people, the system could not work.

It would be expensive. The kind of people required would have to be well-paid. But the initial expense could be justified by the ultimate savings, and upon even broader grounds. The correctional establishment itself would have to bring in many new and well-paid technicians and specialists and greatly enlarge its facilities and services if its training is to be worth-while.

Then, even with such a staff, the job would be enormous, and leadership in its operation must be found to prevent its becoming routine or institutional. There is little doubt that the "institutional" method exists in some state institutions which handle related problems where routine eventually puts its dead hand on insight, enterprise and imagination.

There is, moreover, a strong and persistent residue of retribution in public opinion toward punishment for crime, especially in sensational cases. There is a strong residue in judicial opinion accepting the workable value of the deterrent policy of a given punishment for a given crime. There is a feeling both in the legal profession and out of it that the "sentence" of a criminal is for the trial judge. Even in England, where great modern strides have been made in criminology, the sentencing power remains today with the trial

judge, but there is a rather closer understanding between the courts and other agencies involved of the nature of the problem they face together.

Even if the basic change in the sentencing power may be very slow in formulation and adoption, there are steps that are possible and practicable to be taken today to improve our penal system and to help align it with modern thought. That they should be taken, and taken gradually toward the ultimate aim is not only practical, but it is in harmony with the pragmatic methods and experience of our system of law. Some of these are:

1. Abolition of the minimum in indeterminate sentences for adult offenders. This would require the imposition by the trial judge of a maximum sentence. The length of sentence within the range of the maximum fixed by the judge would be determined by the Board of Parole under substantially its present or improved procedures. This idea has been followed in the maximum sentence under the Youthful Offenders Act. The present "minimum" is not uniformly applied and it imposes a statutory limitation on the jurisdiction of parole authorities.

2. As long as the courts continue to be required to impose a minimum in indeterminate sentences, full reports upon the prisoner should be before the sentencing judge in every court. This would extend to all counties of the state studies which are now available only in large urban centers. The information before the judge should be as broad as possible and not limited to a mere list of arrests and convictions.

3. Abolition of most short term imprisonment for a year or less, except in a certain few cases. Such sentences under existing conditions have no reformative value for the prisoner; they do not help him or the community. They do not even give any support to the "deterrent" theory and are useless to society or the offender.

4. Improvement of trial procedure. The sensational element in trials should be eliminated. The trial should be a careful and detached and, above all, a fair inquiry into the facts, and judges and prosecutors and defense counsel should aid in this effort. The legal profession has been moving in this direction, but it cannot do the job alone. It needs the support of a well-informed public opinion.

5. Since rather strong and probable assurance of detection is an essential of any successful administration of criminal justice, the police agencies of the state and localities should be strengthened by the use of the best techniques and organization in the detection of crime.

If progress is to be made in administering the criminal law in New York, a much closer working cooperation must be established among the independent agencies of the state administering the penal system. It would be helpful, therefore, if the Legislature established a Council of Criminal Justice.

Such a council could perform services of enormous importance in the penal system, just as the Judicial Council and the Law Revision Commission have in related fields performed important public service.

The council first of all could bring into working harmony agencies which often seem to know little of each other or of the special problems faced in different aspects of administering criminal law. The council should be very broadly based. It should have represented in its membership the trial judges who hear criminal cases; the prison administration; the prosecutors; the teachers; the parole administration; the police administration; the social agencies; and the agencies in charge of housing and slum clearance.

The council should study the incidence of crime; the social and economic conditions of the several areas of the state in which the incidence of crime is high; the procedures followed by the police and prosecuting officers; the judicial procedure; the operation of the sentencing powers; the management of prisons and other correctional institutions; and the operation of parole. It should suggest changes where they are indicated.

It should supervise the preparation of careful and complete statistics on these subjects and demonstrate their interrelation. There is no doubt that full statistics are one of the most effective basic instruments of modern criminology.

And from these studies improved procedures and techniques will be evolved; a wider understanding of the nature of the problem in the public mind will result, and a greater cooperation among the agencies within whose orbits lies responsibility for the administration of the criminal law. And from this, that administration will provide better social order and improved public protection against crime.

SOLDIERS' AND SAILORS' WILLS IN NEW YORK

By Quentin E. Grant and George V. Palmer

(PART II)[1]

III Dating of Holographic Wills

It will be noted that the only requirement specifically set forth with respect to the formalities to be observed in the execution of holographic wills by new Section 16 of the Decedent Estate Law is that they be "written entirely in the handwriting of the maker." The words in the statute following that requirement, *ie:* "even though the same be unattested," may indicate, however, that the formalities, other than attestation, required for a valid formal will under Section 21, may also apply to the service wills provided for in Section 16. However that may be, the question arises as to whether dating of these wills is necessary in order that they have validity. It is sometimes rather loosely said that there is a fairly even split of authority as to the necessity for dating holographs. However, even a cursory examination of the individual cases in American jurisdictions will show that, almost without exception, those states which require dating of holographs do so pursuant to specific statutory provision.[2] In four states where statutes did not require dating of holographs, the courts have not seen fit to impose such a requirement.[3] In Mississippi, which had no statute requiring it, the courts have said that a holograph must be dated and signed; but their statements to this effect may be considered dicta, inasmuch as the two decisions touching on the point and holding the wills in question invalid, turned on the fact that

1 In Part I, published in the June, 1948, issue of the Albany Law Review (Vol. 12, No. 1) the authors treated the history of servicemens' and mariners' wills, the meaning of "actual military or naval service" and "mariner while at sea," and the requirement of amended Section 16 that a holographic will be written entirely in the handwriting of the maker.

2 E.g., "A holographic will is one that is entirely written, dated and signed by the hand of the testator himself." Calif. Probate Code, Sec. 53, La., N.D., Mont., Okla., and Utah are similarly committed by statute.

3 Ariz., Ark., N.C., and W. Va.

there was a lack of testamentary intent upon the part of the alleged testator.[4] In an Alabama case the absence of a signature and date was urged as a ground for invalidity during the attempted probate of a holograph, but in denying probate the court based its decision principally upon the absence of a signature.[5]

Section 21 of the New York Decedent Estate Law, governing the execution of the formal attested will, requires among other things that a written will be subscribed, but at no place in that statute is it required that a will be dated. A leading New York case dealing with the requirements for dating formal wills puts it this way: "The Revised Statutes do not require that a will shall be dated. The date may be established by parol evidence showing the real date of its execution."[6] Since the general rule is that formal wills need not be dated it would seem unreasonable that those informal in nature should be subjected to such a requirement.

At this point it may be appropriate to note that in no American jurisdiction is it regarded necessary that the place of execution of a holograph be set forth in the instrument.[7] Therefore, it seems unlikely that New York will require it.

While the dating and naming of the place of execution of a holograph will probably not be required by the New York courts, nevertheless, the presence of these two elements would undoubtedly be of considerable evidentiary importance when questions of testamentary capacity or of several conflicting wills are involved. Furthermore, the presence of the date might well aid in the detection of forgeries and be of some importance on the question of testamentary intent, the theory being that one making a last will and testament would be expected to do as complete and careful a job as the circumstances permit.[8]

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4 Young v. Wark, 76 Miss. 829 (1899). Sullivan v. Jones, 130 Miss. 101, 93 So. 353 (1922).

5 Bolinger's Heirs v. Bolinger's Executors, 22 Ala. 826 (1896).

6 Re Haviland, 17 Misc. 193, 40 N.Y. Supp. 973 (1896).

7 Sted v. Curtis, 191 Fed. 529 (CCA 9th, 1911). An indication of the place of making would certainly be relevant, however, to the question of whether testator was "on an expedition."

8 The subject of the need for, and the sufficiency of, dating holographs is exhaustively treated in Note, 147 A.L.R. 898. A less recent discussion, brief, but thoroughly referenced will be found in Note, 28 Yale L. J. 72.

IV. *Duration and Revocation of Informal Wills*

> "Any such disposition of property by a solider or sailor shall become invalid and unenforceable upon the expiration of one year following his discharge from military or naval service provided he possesses testamentary capacity at the time of such expiration; if, however, he shall lack testamentary capacity at the expiration of one year from the date of such discharge, it shall continue to be valid and enforceable until the expiration of one year from the time he shall have regained testamentary capacity."

This final paragraph of Section 16, as amended in 1942, brings into view problems concerning the revocation and duration of nuncupative and holographic wills. The former version of Section 16 placed no express time limitation on the duration of nuncupative wills made by soldiers in actual military service and mariners at sea. A New York Court in a dictum concerning the matter had indicated that it would impose no time limitation on the wills of mariners.[9] One English case reveals the probate of such a privileged informal will 42 years after its execution.[10] But in *Leathers v. Greenacre*,[11] one of the leading American cases on the subject of service wills, there was a dictum indicating that the privilege extended to soldiers and sailors should be limited as it was by the Roman law which first accorded it and which gave such informal wills validity for only one year after the testator's dismissal from the army.

However, amended Section 16 causes the wills of soldiers and sailors to expire one year after discharge if at the end of that year they possess testamentary capacity, or one year

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9 Matter of O'Connor, 65 Misc. 403, 406, 121 N.Y. Supp. 903, 905 (1909). "In submitting to this view (that a soldier's or sailor's will need not be made in extremis) it may well be remarked that its dangerous effect is that a mariner's oral will, once made at sea, may remain for his lifetime . . ., however ample the testator's opportunities for a deliberate statutory will may have been in the meantime."

10 Booth v. Booth (1926) P. 118. The court in this case repudiated the dictum in Drummond v. Parish, 3 Curt. Ecc. 522 (1843), that a soldier's or mariner's will would be valid for only one year after it was made, by stating that the privilege of the soldier was the same as the privilege of the civilian before the Statute of Frauds, i.e., no time limitation on validity.

11 53 Me. 561 (1866).

following the reacquisition of testamentary capacity if it did not exist at the time when the will normally would have expired under the statute. Apparently one who regained testamentary capacity shortly before the expiration of the year following discharge would have only until the expiration of that current one year period in which to change his testamentary disposition or risk possible intestacy. In some instances that might be a very brief period.

It is to be noted that mariners are not included in this provision. It would seem that their informal wills continue to be in force indefinitely if properly executed. And since the legislature has now differentiated between sailors in actual naval service and mariners at sea it would appear that the legislature clearly intended that informal wills of sailors in the naval service should in no case be valid beyond the stated post-discharge period, even though traditionally and technically such a sailor is a mariner.[12]

This express time limitation on the duration of service wills puts the New York law back into line with the civil law jurisdiction which had, following the Roman law, placed time limitations upon the effectiveness of informal testamentary executions by military personnel.[13]

Several questions concerning revocation of wills, both formal and informal, may arise as a result of the enactment of new Section 16. It should be noted at the outset that the new section itself makes no express provision for the revocation of the informal service wills which it authorizes and furthermore it does not indicate whether or not they will be effective to revoke prior-executed formal wills. It may be, therefore, that the legislature intended Section 34 of the Decedent Estate Law[14] to control revocatory problems involving informal wills.

If Section 34 is to govern, there is ambiguity now latent in that section precipitated by new Section 16. That is, do

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12 Matter of Gwin, 1 Tuck. 44 (N.Y. Surr. Ct. 1865).

13 Muirhead, Private Law of Rome 320 (2d ed. 1899).

14 Section 34: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; . . ."

the words "and executed with the same formalities with which the will itself was required by law to be executed" modify *both* the preceding clauses, "some other will in writing" and "or some other writing of the testator, declaring such revocation or alteration" or only the latter clause? This question would not have arisen prior to the enactment of new Section 16 because New York at that time did not recognize holographs executed without the full formalities prescribed by Section 21.[15]

Depending upon the applicability of Section 34 to problems involving informal service wills the following questions present themselves. *First,* can an unattested holograph effectively revoke a prior-executed formal will? If the words of Section 34 referred to in the preceding paragraph do modify both the antecedent clauses, then the answer would seem to be "no," because an unattested holograph is not executed with the same formalities with which a formal will is executed. And on the other hand if only the latter of the antecedent clauses is modified the holograph may very well be sufficient to revoke because it is a will in writing.

In any event it does not seem that a nuncupation is sufficient to revoke a formal will if Section 34 is controlling, because that section requires at least a writing to accomplish revocation.

Second, can one holograph revoke another while the privilege of testation in this manner still exists for the testator? It would seem that this is possible since the revocatory will would be executed with the same formalities as required for the will revoked and therefore conforms to the literal requirements of Section 34.

Third, can a holograph be revoked by a nuncupation? Since Section 34 requires the revoking will to be in writing it does not seem that a nuncupation would be sufficient.

Fourth, can a holograph revoke a nuncupation? Section 34 applies only to the revocation of written wills. Therefore, the answer to the present problem must be found outside the statute. While no decision has been found touching on this point, it does seem that the answer should be in the affirmative.

15 Matter of Zaiac, 279, N.Y. 545, 18 N.E. 2d 848 (1939).

Fifth, is one nuncupation susceptible of revocation by another nuncupation? Here again Section 34 is of no help and no pertinent decision has been found, but there seems to be no apparent reason for not allowing revocation in this situation.

The foregoing questions are but a few of those which exist today as a result of careless draftsmanship in amended Section 16, which, while allowing informal wills to stand for one year or more following discharge in the case of service personnel and indefinitely in the case of mariners, makes no express provision for their revocation.

V. *Age Capacity*

Much speculation and discussion, but few cases, concerning servicemen's wills relate to the question: "Does the privilege of making informal wills, extended to servicemen and mariners, carry with it a grant of testamentary power irrespective of statutory requirements as to age for testamentary capacity?"

England did not impose minimum statutory requirements as to age for testamentary disposition of personal property until 1837,[16] and shortly thereafter in *Goods of Farquhar*[17] it was held that servicemen's wills were entirely free of statutory limitation and that the age requirements did not apply. The holding in the *Farquhar* case was criticized by In re *Wernher,*[18] decided during the first World War. In this case an army officer who had not reached the statutory age for testamentary capacity had executed a formal will which had been admitted to probate by the lower court. The appellate court affirmed the probate but was reluctant to do so on the ground that the privileges granted to service personnel relate to execution formalities only and not to matters of capacity. But in 1918, before an appeal could be taken as suggested by the court, Parliament settled the question by enacting an amendment to the wills statutes to the effect that soldiers

16 7 Wm. IV & 1 Vict., c. 26, sec. 7 (1837). Prior to the enactment of this statute and even prior to the English Statute of Frauds (1676) 14 years was the testamentary age with respect to personalty and applied to soldiers and civilians alike.

17 4 Notes of Cases 651 (Ecc. 1846).

18 (1917) 1 Ch. 339.

and mariners at sea could make wills of personalty despite their being under age.[19]

In the United States the statutes conferring special privileges with regard to the making of servicemen's and mariners' wills frequently contain language similar to the following:

> "Notwithstanding this act . . . any soldier, being in actual military service, may dispose of his . . . personal estate as he might have done before the making of this act."[20]

This wording occurs in substance in the English act under which several courts held that testamentary power of service personnel is enlarged by statute even to the extent of leaving the privileged group unaffected by the age capacity requirements. A lower court decision in Pennsylvania[21] allowed probate of a will made by an infant relying on the inclusion of such language in the statute of that state. However, the highest courts of two American states, Vermont[22] and Iowa[23] have held flatly that such privileges extended to the favored individuals relate solely to execution formalities.

In the Vermont case the court held that a Civil War veteran's written will was invalid despite the fact that the state's wills statute contained the sweeping provision that a service man might dispose of his property "as he might otherwise have done." There the court said,

> "We do not think the statute enables an infant to make a valid will under any circumstances. The Statute of Wills, in general terms, limits the right of disposing of property by testament to persons of full age. After declaring the forms which must be observed in their execution, it provides that nothing in this chapter shall be construed to prevent any soldier in actual military service, or any mariner or seaman being at sea, from disposing of his wages or other personal estate, as he might

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19 Wills (Soldiers and Sailors) Act. 1918, 7 & 8 Geo. V, ch. 58, sec. 1, Supra, Part I, note 14.

20 Pa. Wills Act of 1917, June 7, P.L. 403, Sec. 5.

21 Henninger's Estate, 30 Pa. Dist. 413 (1921).

22 Goodell v. Pike, 40 Vt. 319, (1867).

23 193 Iowa 1240, 188 N.W. 744 (1932).

otherwise have done. We think the words '*as he might otherwise have done*' refer merely to the mode of execution."[24]

The Iowa court adopted a similar attitude toward a formal written will executed by a minor while serving with the military forces. Evans was killed in action and the probate of his will was refused on the grounds that the privilege of informal testamentary execution was accorded to service personnel to compensate for their being handicapped by lack of facilities and counsel and not for the purpose of conferring any special privilege as such. This rationale finds its source in the early Roman law statutes which declared this to be the reason for granting the privilege of informal execution. Iowa's statute permitted the designated class to dispose of all personalty by nuncupative wills whereas the right of civilians to dispose by the same method was limited to the amount of $300 in personalty. The Iowa statute contained no sweeping language such as might have been said to exempt military testaments from the requirements of statutory law generally.

The court emphasized the fact that a territorial statute (1842) employing broad language similar to that of the English statute,[25] was altered by the legislature, which deleted this wording, when Iowa became a state.[26] The existing statute was declared unambiguous, and no occasion was seen for examination of its predecessor for a discovery of legislative intent.

On the question of legislative intent, the Iowa court also pointed out that soldiers were permitted to vote by absentee ballot but that the legislature had not, by virtue of their being in service, allowed any relaxation of age, residence or other similar qualifications.

The picture in New York State has been much confused by the broad dictum of *Hubbard v. Hubbard*[27] wherein the court made the following observation:

"As to the wills of soldiers in actual service, and mariners at sea, they are left entirely untrammeled by our statutes, and are governed by the principles of the common law."

24 40 Vt. 319, 323.
25 Supra, Part I, note 14.
26 Iowa Code Section 3273.
27 8 N.Y. 196, 199 (1853).

This dictum left a strong impression upon succeeding New York courts in deciding the few cases which did arise concerning informal wills. In 1939, in *Matter of Zaiac,*[28] the surrogate allowed certain letters to be probated as a soldier's holographic will, on the theory that, while Section 16 covered expressly only "nuncupative or unwritten wills," nevertheless soldiers' testaments were unrestricted by statute and therefore the common law holograph should be valid. The lower court decision was modified in the Appellate Division[29] and the Court of Appeals in reversing the Appellate Division[30] said that the holographs could not be admitted to probate because they were not properly attested in accordance with provisions of Section 141, Surrogate's Court Act.

In assaying the probable position of the New York courts toward this problem it would seem that they will not uphold wills executed by persons under the statutory age, whether the attempted dispositions be of real estate or personalty, merely by virtue of their being in service or employed as mariners at sea for the following reasons: *First,* the New York statute does not contain the customary phrasing to the effect that service personnel and mariners might, notwithstanding the other sections of the wills statute, execute their wills as they could have prior to the enactment of the wills statutes containing age requirements. *Second,* the comparatively recent *Zaiac* case, *supra,* has taken much force out of the *Hubbard* case dictum concerning the unrestricted nature of servicemen's and mariners' testaments. *Third,* the highest courts of two American jurisdictions have held against the validity of such testamentary instruments, while only one American decision has been found which extended such testamentary capacity. *Fourth,* if wills made by those under age while in service were valid when made, the testamentary capacity would end upon discharge and an oral will might often be irrevocable for one year or more. Making a testamentary disposition thus irrevocable in this way would be a much more drastic step than would seem appropriate without clear legislative mandate.[31] *Fifth,* Sections 10 and 15 of

28 162 Misc. 642, 295 N.Y. Supp. 227 (1937).

29 255 A.D. 718, 5 N.Y. S. 2d 897 (1938).

30 279 N.Y. 545, 18 N.E. 2d 848 (1939).

31 See Re Wernher, supra, note 20, for argument on this point.

the Decedent Estate Law[32] clearly require that a testator must have reached his majority in order to devise real estate and the age of 18 to bequeath personalty. It seems unlikely that Section 16 has modified these age requirements in any respect, but the question is troublesome particularly since new Section 16 covers both real property and personalty. A liberal interpretation of Section 16 on the matter of age capacity might find the courts in the inconsistent position of upholding nuncupations of personalty of those under 18, yet repudiating their holographs in hesitating to ignore the immediately preceding section wherein a writing is required, thereby allowing what is generally regarded as a comparatively unreliable testamentary method to prevail in standing over one that is regarded as more nearly on a par with formal written wills.

The strongest argument in favor of reading into the act an enlargement of testamentary age capacity might rest upon the fact that Section 16 was so completely overhauled in 1942 as to evidence an intention on the part of the legislature that the whole problem should be regarded in a new light and that the courts should not be restricted by the then existing statutory age requirements or by decisions such as that in the *Zaiac case*.[33]

VI. *Witnesses*

A problem as to witnesses arises under amended Section 16. This statute provides that a nuncupative will must be "made within the hearing of two persons" and that the execution and the tenor thereof must be proved by at least two witnesses.[34] Does this mean that the two persons overhearing the declaration must do so simultaneously?

It was held under former Section 16 that testamentary declarations made in substantially identical terms upon two

32 Section 10: "All persons except idiots, persons of unsound mind and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this article." Section 15: "Every person of the age of eighteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing." Note that Section 16 today includes both real property and personalty in its provisions.

33 Supra, note 30.

34 Supra, Part I, note 1.

occasions, each time to a single witness, was sufficient.[35] But that statute, unlike the present one, made no provision as to any formalities required in the execution of nuncupative wills and the decisions cited were based on the reasoning that even under the formal requirements of Section 21,[36] a testator is permitted to acknowledge his signature and declare it to be his last will and testament to the witnesses upon separate occasions. The court said in both cases that there were no stronger restrictions in regard to the execution of a soldier's oral will.

However, there appears to be room for argument that the words "within the hearing of two persons" should be so construed as to require the simultaneous presence of both witnesses. This novel requirement may be indicative of such an intent on the part of the legislature.

Nevertheless, in a recent New York decision, handed down since the amendment of Section 16, the Court stated as follows:

> "As to the nuncupative will, the respondent raises the point that the declaration was not made in the presence of the two witnesses when they were together, but was made on different occasions. It has long been the law that in the execution of an ordinary will it is not necessary to publish it before the attesting witnesses at the same time, but that this may be done at different times. I hold, therefore, that the nuncupative will comes in the same category, and the declaration of the same matter to two different witnesses at different times complies with the statute, . . . "[37]

VII. *Miscellaneous*

Inasmuch as the new Section 16 does not expressly require that a serviceman's or mariner's holograph be subscribed, or even signed, the question arises as to whether a subscription

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35 Matter of Mason, 121 Misc. 142, 200 N.Y. Supp. 901 (1923); accord, Matter of Mallery, 127 Misc. 784, 217 N.Y. Supp. 489 (1926), aff'd 247 N.Y. 580, 161 N.E. 190 (1928).

36 "3. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses."

37 In re Thompson's Will, Misc. , 76 N.Y. S. 2d 742, 746 (1948).

or signature is requisite to the validity of such testament. It seems probable that a signature, at least, will be required for identification purposes. But whether Section 21 of the Decedent Estate law will govern these informal wills and thereby impose its requirement of subscription would seem to depend on whether the legislature in enacting Section 16 has merely eliminated the necessity of attestation where the serviceman has written his will in his own hand or whether it has created an entirely new type of will.[38] So far there has been no decision touching upon this point but should the first mentioned possibility be the correct one, probably a subscription will be necessary. If the latter, a signature somewhere in the body of the instrument should be sufficient.

In considering the validity of any nuncupative or holographic will it must always be borne in mind that testamentary intent on the part of the testator must be shown just as in the case for formal wills even though his circumstances qualify him for the informal mode of testamentary execution.

This point is well illustrated in *Matter of O'Connor*[39] where an oral will was made by the chief engineer on a ship two days from port. He was desperately ill and his physician had informed him that his malady was usually fatal. The will was upheld, even though the testamentary disposition was elicited in response to questions presented by companions. The court remarked: "Sickness may not be necessary to the validity of the transaction but it affords grounds for believing that the act, which might not have had testamentary meaning, if done in health, assumed the gravity and significance of a will when done by one confronted with death."[40]

In New York, servicemen's and mariners' oral wills need not be reduced to writing within any particular time in order to be probated. However, the Surrogate's Court Act does require the proofs to be reduced to writing by the time of probate.[41] In states where civilians are accorded the privilege of nuncupation there is usually a statutory provision to the effect that unless the will is reduced to writing within a

38 See discussion under III (Dating of Holographs), supra.

39 65 Misc. 403, 121 N.Y. Supp. 903 (1909).

40 Id. 408; See also Re Buehrer, 349 Pa. 353, 37 A.2d 587 (1944).

41 N.Y. Surr. Ct. Act, Sec. 141.

specified number of days after making, it may not be probated if offered for probate more than six months or some other statutory period after execution.

The New York statute is the first in the United States to make realty devisable by oral will. However, at the end of the first World War, England provided by statute that the realty of service personnel could be disposed of in the same manner as personalty.[42] With personal property becoming more and more valuable in society as compared with realty, such a trend seems only logical. In 1931 the state of West Virginia raised the age requirement for testamentary capacity as to personalty from 18 to 21 years in order that it should be the same as that for real property. The reviser's note[43] set forth, as the reason for the change, the fact that personal property is assuming this comparatively greater importance.

The constitutionality of the privileges given to service personnel and to civilians *in extremis* has been attacked as a denial of equal protection of the laws under the 14th Amendment to the Federal Constitution. However, it was held that a reasonable basis existed for the discrimination.[44]

Section 27 of the New York Decedent Estate Law prevents an interested witness from taking under a will in cases where his testimony is necessary to prove the will. This section pertains only to "subscribing witnesses" and therefore interested witnesses to oral testaments are not explicity covered. But in view of the intent to avoid fraud manifested by the legislature in enacting Section 27, it may well be that the courts will in some manner prevent a witness to a nuncupative will from taking thereunder, where the will cannot be proved without the testimony of that witness.

It should be noted that many states have modified by statute the customary conflict of laws rule that the law of situs governs the formality of execution for a will of real property and that the law of domicile governs the formality for executing a will of personalty. So in many cases it may

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42 Wills (Soldiers and Sailors) Act. 1918, 7 & 8 Geo. V., ch. 58, sec. 3.

43 W. Va. Code of 1943, Ch. 41, Art. 1, Sec. 2.

44 In re Holliday's Will, 180 Tenn. 646, 177 S.W. 2d 826 (1944).

yet be possible to have probate of a service will defective in execution according to traditional conflicts rules.[45]

The present article together with that which appeared in the June, 1948, issue of this review have touched but a few of the many possible problems arising out of the 1942 amendment of Section 16 of the Decedent Estate Law. Because of the very small number of decisions involving former Section 16 and the section as amended, it has been difficult, often impossible, to form any positive conclusions with respect to the manner in which these questions will be treated should they confront the courts of New York. It seems clear that greater care in the drafting of the amendment would have obviated many of the suggested problems.

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45 See N.Y. Dec. Est. Law, sections 22-a and 23 which allow three choices of law for execution formalities: The law of (1) place of execution (2) place of testator's domicile (3) New York. The following states, among others, have enacted similar statutes: Mass., Mich., Ohio, Wash., and Wisc.

Legislation

Introduction: While many practising attorneys and most students were away from their offices and books during the recent war period, the legislature continued the constant statutory amending process. Returning lawyers found themselves confronted with a wealth of new, important changes. The editors have selected, and here present, the significant changes enacted in certain branches of New York substantive and adjective law. Many changes are of necessity summarily treated; some of the less important ones are omitted entirely; and no attempt has been made to go beyond the limited scope of the subjects selected.

RECENT DEVELOPMENTS IN NEW YORK CIVIL PRACTICE RELATING TO BRINGING IN NEW PARTIES

What may prove to be one of the most important changes in New York Civil Practice during the past decade was brought about by the 1946 amendments to the Civil Practice Act dealing with the bringing of new parties into an action. These changes, made upon the recommendation of the Judicial Council,[1] were effected by L. 1946 Ch. 971, effective September 1, 1946. As yet the Court of Appeals has not handed down any important decision relating to the changes made by the statute,[2] but a large number of opinions in the

1 Twelfth Annual Report of the Judicial Council of the State of New York Williams Press, Inc. (1946). Legislative Document No. 17, Pp. 12, 167-232.

2 An opinion, per curiam, in Matter of Shillitani v. Valentine, 296 N.Y. 165, 71 N.E. 2d 450, (1947), merely states that in a proceeding to compel restoration of telephone service removed by police, the Police Commissioner cannot be regarded as an indispensable, necessary or proper party or one permitted to intervene in such proceeding. A memorandum decision in Wolf v. V. LaRosa & Sons, Inc., 298 N.Y. 597, 81 N.E. 2d 329 (1948), denied the right of impleader under Section 193a of the Civil Practice Act, but the fact that three judges concurred in a dissent written by Dye, J., who urged the extension of the statute, indicates that the controversy in the courts below as to the scope of the act extends to the Court of Appeals. This case is further complicated as apparently involving joint tort-feasors to which the impleader allowed by Section 193a was not intended to apply.

lower courts and the Appellate Division would appear to indicate considerable divergence of opinion as to the scope and ultimate effect of what one authority terms, " . . . an extensive revision of the practice relating to parties . . . "[3]

The basic change was the repeal of former C.P.A. Section 193 and the enactment of new Sections 193 and 193a.[4] Other changes involved amendments to C.P.A. Sections 180, 192, 264, 278 and 474 and to Rules 54, 102 and 105 of the Rules of Civil Procedure designed to bring these sections and rules into conformity with the new Section 193.

Although there is no doubt as to the statute's having been modeled upon similar provisions in the Federal Rules of Civil Procedure[5] there are significant differences in both the phraseology of the statute and in the procedure prescribed. As a general observation, it may be said that the legislature, in enacting these changes, followed a trend, prevalent for many years, but more noticeable in recent decades, toward the liberalization of third part practice. As one court states,

> " . . . It follows a trend of substance over form; of convenience over legalistic refinements steeped in tradition; of less expensive wholesale litigating over the costly pursuit of individual rights. . . "[6]

Fundamentally there are three major categories of changes intended to be effectuated by the legislation, the first setting up two definite classes of parties whose joinder is sought, the second involving almost completely new procedures and requirements for the impleader of third parties, and the third extending and otherwise affecting the right of third parties to intervene in pending actions. These categories although inter-related, apply to different types of procedures and may be treated as separate and independent. The scope of this survey is limited to the first and second of these categories, where the third parties are brought into the action by those already parties, thus excluding from discussion the new

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3 "1946 Legislation Affecting Practice and Related Matters," Leonard S. Saxe, 18 New York State Bar Association Bulletin 263 (1946).

4 Paragraph 5 of former Section 193 of the Civil Practice Act, dealing with joinder of parties having different interests in realty, was repealed and re-enacted as Section 193-c of the Civil Practice Act by L. 1946 c. 971.

5 12th Ann. Rep. Jud. Council, Pp. 169, 192, 218.

6 Franklin E. Tyrell, Inc., v. Vahlsing, 69 N.Y.S. 2d 602 (1947).

C.P.A. Section 193b which applies to situations where the third parties are brought into actions by their own volition.

Indispensable and Conditionally Necessary Parties

Before the enactment of the new Section 193 of the Civil Practice Act, there had been considerable confusion in the terminology employed by the courts in dealing with parties who *must* be brought into an action and parties who *should* be brought in if possible but whose presence was not absolutely essential to a determination of the controversy between the original parties. To parties whose presence was sine qua non the courts applied the terms, "Necessary,"[7] "Necessary and proper,"[8] "Necessary and indispensable,"[9] and "Indispensable;"[10] while at the same time those who ought to be brought in to give complete relief as between the original parties were sometimes termed "necessary"[11] or "proper"[12] and sometimes were not defined in any manner,

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7 Andrews, J., in Osterhoudt v. Board of Supervisors, 98 N.Y. 239, 244 (1885), stated ". . . The distinction is between those who are necessary parties and those who are proper parties merely. When parties who are necessary parties are not joined, the court will not procceed until they are brought in." Vann, J., in Mahr v. Norwich Union Fire Ins. Society, 127 N.Y. 452, 462-3, 28 N.E. 391, (1891), stated, ". . . Kelly is a necessary party to this action . . . and court of equity should not have proceeded to judgment against the company without first acquiring jurisdiction over him."

8 McGarey, Surrogate, in Matter of Luckenbach, 181 Misc. 265, 268, 42 N.Y.S. 2d 487, 490, Surrogate's Court, Kings County (1943).

9 Finch, J., in Cohen v. Dana, 287 N.Y. 405, 40 N.E. 2d 227 (1942) used the term "necessary and indispensable party" (P. 410) and the term, "indispensable party" (P. 411) in referring to the same party. (See note 10 infra as to the Appellate Division's terminology in the same case). Hofstadter, J., in Mannaberg v. Culbertson, 27 N.Y.S. 2d 642, Sup. Ct. N.Y. County (1942) employed the term " . . . Necessary and indispensable parties . . ." (P. 643).

10 Cohen v. Dana, 262 App. Div. 42, 43, 27 N.Y.S. 2d 809, 810-11 (2nd Dept., 1941) a per curiam opinion referring to an "indispensable party" (See Note 9 supra). Bernstein, J., in Druckerman v. Harbord, 174 Misc. 1077, 1078, 22 N.Y.S. 2d 595, 597, Sup. Ct. N.Y. County (1940) speaks of an indispensable party defendant."

11 Personius, J., in Sisson v. Hassett, 155 Misc. 667, 668, 280 N.Y.S. 148, 150, Sup. Ct., Yates County (1935) variously employed the terms, "necessary and proper party," "necessary party, the real party in interest," and goes on to speak of a "defect, the non joinder of parties." (See note 13 infra).

12 Osterhoudt v. Board of Supervisors, 98 N.Y. 239, 243, 244 (1885). (See note 7 supra). Patterson, J., in Thompson v. N.Y. Elevated R.R. Co., 16 App. Div. 449, 453, 45 N.Y.S. 64, 67 (1st Dept., 1897) speaks of, ". . . Proper if not necessary parties. . ."

the courts treating their absence from the litigation as a "defect of parties" to which an objection should be taken by motion, and if not so taken, would be considered to be waived.[13]

At the same time, the Federal courts had early drawn and consistently followed a clear distinction between the two categories of parties.[14] This distinction had apparently become so fixed that when the Federal Rules of Civil Procedure were drawn up it was found unnecessary to include any definitions of the terms.[15]

Former Section 193 of the Civil Practice Act indicated the existence of such a distinction, but failed to define and clarify it. Paragraphs 1, 3 and 4 of the former section[16] stated under what circumstances parties *must* be brought in, either upon the application of the third parties themselves (intervention) or upon the court's own motion.[17] Paragraph 2 of the same section stated that under certain circumstances third parties *may* be brought in upon the application of either original party.[18]

It is to be noted that the definitions of "indispensable" and "conditionally necessary" parties in the new Section 193 work backward from the effects of the omission of such parties. At the same time, the results of the omission of such parties are made dependent upon which definition is deemed applicable. At first glance this might appear to involve circuitous reasoning somewhat to the effect that a party is in-

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13 Sisson v. Hassett, 155 Misc. 667, 668, 280 N.Y.S. 148, 150 (1935) (See Note 11, supra). See also: 12th Ann. Rep. Jud. Council, P. 178, Note 55 and cases there cited. The objection to an alleged defect of parties was made pursuant to former section 278 Paragraph 1. (e), (derived from Code Civ. Proc. Section 488, Sect. 6; Code of Proc., Section 144 and former Rules 102 and 105 of the New York Rules of Civil Practice).

14 Shields v. Barrow, 17 Howard 58 (U.S.) 130, (1854), opinion per Curtis, J.

15 Rule 19 of the Federal Rules of Civil Procedure does not define either category of parties, merely referring to "indispensable" parties and those "who ought to be parties if complete relief is to be accorded between those already parties."

16 Code Civ. Proc. Section 452 included Paragraphs 1 and 3 of former C.P.A. Section 193. Code Civ. Proc. Sections 452 and 820 both derived from Code of Proc. Section 122. Former C.P.A. Section 193 Paragraph 4 added by L. 1935, c. 798.

17 Bringing in other parties under former C.P.A. Section 193 Paragraph 1 was apparently under the court's own motion. See Code Civ. Proc. Section 453, Rule 48 of N.Y. Rules of Civil Practice.

18 Former C.P.A. section 193, paragraph 2 added by L. 1922, c. 624. See discussion of former impleader practice below.

dispensable because the action can't proceed without him, and the action cannot proceed without him because he is an indispensable party. However, a closer look at the wording of the statute shows that the indispensable party is defined as such not because the action cannot proceed without him, but because his omission would prevent an effective or equitable determination of the action, and that only after the position of the party has been defined, does the second paragraph of Section 193 apply to denote the result of such definition.

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Indispensable parties are persons, " . . . whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between parties before the court."[19]

Under former Section 193, Paragraph 1, " . . . Where a complete determination of the controversy cannot be had without the presense of other parties the court must direct them to be brought in . . . "[20] The statute failed to denote what would be the effect of failure or neglect to bring in such parties after such a direction was made. Earlier practice allowed the court to dismiss the complaint upon the defendant's motion.[21] After the enactment of Section 192 of

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19 (Present) C.P.A. §193, ¶1, L. 1946 c. 671.

20 Former C.P.A. §193, ¶1, Code of Civil Procedure §452, derived from part of Code of Procedure §122.

21 In Steinbach v. Prudential Insurance Co., 172 N.Y. 471, 65 N.E. 281 (1902), it was held, per Vann, J., that on defendant's motion at close of case to dismiss on the ground of a defect of parties defendant, the court should have dismissed the complaint since it appeared that a complete determination of the controversy could not be had when there were persons, not parties, whose rights must be determined, in form at least, at the same time that rights of the parties to the action were determined. This decision was sharply contested: Three judges concurred in a dissenting opinion by Haight, J., who held that Section 452 of the Code of Civil Procedure was not intended to cover such a case and that sections 488 and 499 of the Code required objection to be taken by demurrer or answer or else be deemed to be waived by the defendant. See also Gugel v. Hiscox, 216 N.Y. 145, 110 N.E. 499 (1915), holding that although the objection was not raised by demurrer or answer, defendant's request during the trial that complaint be dismissed on the ground that other persons should have been made parties defendant should have been granted unless within a reasonable time they were brought in. It is to be noted that the provision for allowing a reasonable time for a party to bring in the third person is now included in the statute, C.P.A. Section 193, Paragraph 2, See also, Mahrs v. Norwich Union Fire Insurance Society, 127 N.Y. 452, 28 N.E. 391 (1891).

the Civil Practice Act, the courts held that such dismissal was prohibited by the terms of that section, thus creating an obvious impasse. An action which omitted an indispensable party was prevented from proceeding by the implied limitations of the former Section 193, Paragraph 1, but it could not be dismissed because of Section 192. It would seem that unless such parties were either brought in, or declared not to be in the "indispensable" category, the action might remain in a state of perpetual pendency.

The second paragraph of the new Section 193 prevents the development of any such stalemate. When the indispensable party has not been brought into the action within a reasonable time,[22] the court *shall* dismiss the action without prejudice. It is to be noted that the Federal Rules of Civil Procedure were silent as to what action could or should or must be taken if an indispensable party were not joined. However, the Federal courts usually dismissed the suit where an indispensable party was not or could not be brought in,[23] and a 1946 amendment to Rule 12b of the Federal Rules added failure to join an indispensable party as a ground for a motion to dismiss the complaint.[24]

The new Section 193 of the Civil Practice Act states that such mandatory dismissal shall be without prejudice, thus forestalling any questions which might be raised as to the dismissal's being on the merits. The statute here follows the principle adopted by and followed in the Federal courts.[25]

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A conditionally necessary party is defined in C.P.A. Section 193 as, " . . . a person who is not an indispensable party

22 But cf. language used in Gugel v. Hiscox, 216 N.Y. 145, 110 N.E. 499 (1915).

23 Ducker v. Butler, 104 F.2d 236 (1939); Keegan v. Humble Oil Co., 155 F.2d 971 (1946); Mine Safety Appliances Co. v. Knox, 59 F. Supp. 733. Aff'd., sub. nom. Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 694, 90 L.Ed. 140, 66 S. Ct. 219 (1942). But cf. Keene v. Hale-Halsell Co., 118 F.2d 332 (1941).

24 Amended Federal Rule 12B (7) adopted by U.S. Supereme Court, December 27, 1946, effective March 19, 1948. (See Federal Rule 86-B). Prior to this amendment, the failure to join an indispensable party was raised by motion for judgment on the pleadings under Federal Rule 12 C, United States v. Metropolitan Life Ins. Co., 36 F. Supp. 399 (1941).

25 Ernest v. Fleissner, 38 F. Supp. 326 (1941).

but who ought to be a party if complete relief is to be accorded to those already parties . . . " The definition closely follows the wording of Federal Rule 19b.[26]

Under the former statute there was much confusion as to the effect of the omission of such parties from an action. The Federal Courts, following Rule 19b, decided that the absence of such parties, defined as "necessary" under the Federal procedure, was not usually ground for dismissal, but that they should be brought in if possible.[27]

The new C.P.A. Section 193, Paragraph 2 makes the addition of such persons mandatory if they are within the jurisdiction and can be brought in without undue delay, but allows the courts in their discretion to proceed in the absence of such persons when bringing them in would cause delay or when jurisdiction could be obtained only by their consent or voluntary appearance. In the exercise of the same discretion, however, the statute permits the courts to dismiss the complaint without prejudice if an original party fails or neglects to bring in the conditionally necessary party after a reasonable period without showing good reason for such failure or neglect.[28]

The intended effect of the legislation was to place upon the original party who has not brought in the conditionally necessary party the burden of giving a reasonable excuse for not doing so, and upon his failure or neglect to do so within a reasonable period, to allow the court to dismiss the action without prejudice.

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The third paragraph of C.P.A. Section 193 makes the section applicable to all actions, whether formerly called legal

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26 ". . . persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties . . ." Federal Rule 19 (b).

27 Capital Fire Ins. Co. of Calif. v. Langhorne, 146 F.2d 237 (1945); Greenleaf v. Safeway Trails, 140 F.2d 889 (1944), certiorari denied, 322 U.S. 736, 88 L.Ed. 1569, 64 S. Ct. 1048 (1944).

28 ". . . The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearancce . . ." Federal Rule 19 (b).

or equitable. The purpose of this paragraph is obviously to overcome the effect of decisions such as that in *Chapman v. Forbes*[29] which continued the old rule that while an equity court might join all those who, in modern parlance, would be termed indispensable or conditionally necessary parties, yet in an action at law, the plaintiff might sue whomsoever he wished and could not be compelled to bring in parties whom he had omitted from the action.

In *Chapman v. Forbes,* Judge Peckham noted that the courts had interpreted the original Code of Procedure Section 122 as applying only to actions previously equitable in form and not to legal actions despite the adoption of the single form of action under the same Code of Procedure.[30] He went on to state that the addition of the second sentence in Section 452 of the Code of Civil Procedure (derived from the original Section 122 of the first Code) did not affect the inability of the original party defendant to compel the joinder of a third person, since it in effect called for intervention by the third person himself in order that the court might order him to be brought in as a party in the particular types of actions to which the second sentence of Section 452 applied.[31] The old common law rule was stated and the court held, (P. 538) that by the statute it never was intended nor required that a plaintiff in an action at law must sue any others than the persons he should choose.

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29 123 N.Y. 532, 26 N.E. 3 (1890).

30 Sawyer v. Chambers, 11 Abb. Pr. 110 (1860); McMahon v. Allen, 12 How. Pr. 39 (1855); aff'd 3 Abb. 74 (1867); Webster v. Bond, 9 Hun 437 (1876).

31 This distinction was apparently followed in Rosenberg v. Saloman, 144 N.Y. 92, 38 N.E. 982 (1894), holding that so much of Code Section 452 as was a literal re-enactment of the original Code Section 122 applied only to equitable actions but such construction was not extended to the new and added provision of Section 452 allowing intervention. People v. Albany & Vt. RR. 77 N.Y. 232 (1879) was cited to the same effect. In Bauer v. Dewey, 166 N.Y. 402, 60 N.E. 30 (1901) Code Section 452 was held not to allow intervention in an action where the title to real specific or tangible personal property was not involved (in that case a debt) the court stating that by allowing such intervention, other issues than those involved between the original plaintiff and defendant would be permitted. See also Brooklyn Cooperage Co. v. Sherman Lumber Co., 220 N.Y. 642, 115 N.E. 715, (1917), and Garrigues Co. v. Casualty Co. of America, 220 N.Y. 588, 115 N.E. 1036 (1917).

The rule of *Chapman v. Forbes* was followed by the New York Courts down to the 1946 Amendment[32] despite the adoption of the interpleader and intervention statutes which greatly reduced the plaintiff's absolute control of the matter of who should be made defendants. Echoes of the rule might be heard in a recent decision[33] involving the new Section 193 in which the opinion states that, " . . . a plaintiff may ordinarily choose whom he will sue and the enactment of the new Section 193 of the Civil Practice Act does not change the situation . . . "[34]

The Judicial Council, in recommending the adoption of the new Section 193 intended that it should not be made applicable to special proceedings, actions against joint debtors or partners, nor to the New York rule as to contribution among joint tort-feasors as stated in *Fox v. Western New York Motor Lines*.[35] Likewise, there was no intention of applying the new section to the existing rules regarding compulsory joinder of parties in certain real property actions.[36] However, a great many of the cases construing the new section involved attempts to bring in joint tort feasors under the admittedly broader scope of the new statute, and many of the apparently contradictory views of the court in recent decisions are to be explained by the reluctance of the courts to apply the new section to cases to which it never was intended to relate.

Impleader Practice Under Section 193a

The first impleader statute in New York was enacted in 1922.[37] Although it was apparently derived in part from the

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32 See Harley v. Plant, 210 N.Y. 405, 104 N.E. 946 (1914); McDermott v. Lawyers' Mortgage Co., 232 N.Y. 336, 133 N.E. 909 (1922); Wilcox v. Mutual Life Ins. Co., 235 N.Y. 590 (1923); Newhall v. Longacre Bank, 248 N.Y. 252, 162 N.E. 23 (1928). But cf. a series of cases dealing with insurance companies, Sisson v. Hassett, 155 Misc. 667, 280 N.Y.S. 148 (1935); Yezek v. D.L.& W. R.R., 176 Misc. 554, 28 N.Y.S. 2d 36 (1941); Barrett v. Matson, 177 Misc. 864, 32 N.Y.S. 2d 60 (1942); Arnold v. Kensington Plaza Garage, 179 Misc. 700, 697 (1943). Joinder in such cases is complicated by the issues relating to prejudice of the jury, Purdy v. McGarrity, 262 App. Div. 623, 30 N.Y.S. 2d 966 (1941) reversing 176 Misc. 82, 26 N.Y.S. 2d 731 (1941).

33 Heydt-Mugler Co. v. Westerman Const. Corp., 188 Misc. 546, 68 N.Y.S. 2d 361 (1947).

34 Id. at 547 of 188 Misc.

35 257 N.Y. 305, 178 N.E. 289, 86 A.L.R. 642 (1931).

36 Judicial Council, 12th Annual Report, Pp. 184-185.

37 L.1922 c.624 adding a new Paragraph 2 to the former C.P.A. §193. This was renumbered as paragraph 3 of §193 by L.1945, c.861.

English Practice Rules,[38] the original New York impleader practice was very limited in its scope. Furthermore the New York courts soon began to restrict the application of the statute.[39] The statute itself required that the party to the original action make application for leave to implead and that he state that the third person " . . . is or will be liable to such party . . . "[40] The latter requirement led the courts to rule that the liability over could not be merely contingent[41] thus eliminating indemnitors from the class of persons who might be impleaded.[42]

As the former Section 193 originally read, the rights of the impleaded party were severely restricted. In effect, the courts ruled that although the statute stated that he was to be brought in as a party to the action, he did not thereby become a party to the original controversy[43] and thus could not take part in that controversy in any way. Logically this led to the conclusion that any determination of the original controversy did not bind the impleaded party.[44] The result, in such cases, was to render the intended beneficial effects and operation of the statute[45] almost nugatory, by allowing, if

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38 Rule 48 of Order 16 of the English Practice Rules. See Neuss, Hesslein & Co., Inc. v. Nat. A. & C. Co., Inc., 120 Misc 164, 197 N.Y.S. 808 (1923), May Co. v. Mott Avenue Corp., 121 Misc. 398, 201 N.Y.S. 189 (1923). Contra: Fedden v. Brooklyn Eastern District Terminal, 204 App. Div. 741, 199 N.Y.S. 9 (1923), Hailfinger v. Myer, 215 App. Div. 35, 212 N.Y.S. 746 (1925).

39 Houghton, Charles; Impleading Third Party Defendants in New York, II N.Y.U. Intramural Law Review 40, (October 1946) 41-43.

40 Former CPA Section 193 Paragraph 2, L.1922 c.624, later renumbered as paragraph 3 (See note 37 supra). The new paragraph 2 of the former C.P.A. 193 added by L.1945 c.861 contained the same requirement that the other party or parties, ". . . is or are, or will be, liable to the moving party . . ."

41 Krombach v. Killian, 215 App. Div. 19, 213 N.Y.S. 138 (1926); Hines v. National Gum & Mica Co., 124 Misc. 511, 208 N.Y.S. 460 (1925).

42 Houghton, op. cit., P. 43. The author goes on to state that later decisions apparently anticipated the statutory changes made by the new C.P.A. Section 193 A (1) and allowed the impleader of indemnitors, citing 125 West 45th Street Restaurant Corp. v. Framax Realty Co., 249 App. Div. 589, 293 N.Y.S. 216 (1937), and First Nat. Bank of N.Y. v. Bankers Trust Co., 151 Misc. 233, 271 N.Y.S. 191 (1934). See, however, Provenzano v. Nadelstein, 261 App. Div. 979, 27 N.Y.S. 2d 429 (1941), decided on the authority of Krombach v. Killian, 215 AD 19, 213 N.Y. Supp. 138 (1925), and McCormack v. City of N.Y., 182 Misc. 854, 46 N.YS. 2d 261 (1944).

43 Municipal Service Real Estate Co., Inc. v. D.B.&M. Holding Corp., 257 N.Y. 423, 178 N.E. 745, 78 A.L.R. 323 (1931).

44 Id. at 429.

45 Davis v. Hauk & Schmidt, Inc., 232 App. Div. 556 at P. 557, 250 N.Y.S. 537 (1931).

not requiring, the impleaded party to re-litigate the issue of the original defendant's liability to the original plaintiff.[46]

Perhaps the greatest obstacle to the broad application of the former impleader statute was the requirement laid down by the courts that there be identity between the original claim and the claim over. *A fortiori* in any impleader action there must be some connection or relation between the original action and the third-party action, and the original statute went further than this to require recovery by the plaintiff against the original defendant as a condition to the latter's recovering against the impleaded party.[47] However, the courts developed the rule that allowed impleader only if there were identity between the original and third-party causes of action or identity of the grounds upon which they were based. This was established fully in the leading case of *Nichols v. Clark, MacMullen & Riley*[48] which also stated the corollary that when the plaintiff's claim rests on one or more grounds, one of which will not support a claim over against a third person, impleader of that person will be denied.[49] Thus in many situations, the original plaintiff, under this rule, could prevent the impleader of a person he wished to exclude by merely including in his complaint an additional ground of recovery which would not serve as a basis for the defendant's cause of action against the third party.[50]

Attempts to correct these and other defects in the impleader practice began to be made soon after the original statute's enactment. In 1923 impleader was made discretionary by L. 1923 C. 250 which omitted the former portion of paragraph 1 of the former Section 193 making it mandatory for the court to order the third person to be brought in. Recommendations of the Bar Associations and the Judicial Coun-

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46 Judicial Council, 12th Annual Report, P. 209.

47 Zauderer v. Market St. Long Beach Realty Corp., 128 Misc. 364, 218 N.Y.S. 669 (1926), aff'd 221 App. Div. 760, 222 N.Y.S. 925 (1927), holding that if plaintiff's defeat in the original action was essential to defendant's recovery from the third party, the latter could not be impleaded under the former Section 193.

48 261 N.Y. 118, 184 N.E. 729 (1933).

49 Parness v. Halpern, 257 App. Div. 678, 15 N.Y.S. 2d 199 (1939); Schwartz v. Crawford, 261 App. Div. 825, 24 N.Y.S. 2d 494 (1941); Lumber Mutual Casualty Ins. Co. of N.Y. v. Roberts, 266 App. Div. 749, 41 N.Y.S. 2d 232 (1943).

50 Houghton, Op. cit., P. 42; Judicial Council, 12th Annual Report, P. 206-207.

cil did not bear fruit until 1945 when the former Section 193 was re-numbered and a new section 2 was added which allowed the impleaded party to take part in the original controversy to the extent of asserting cross claims against any or all of the other parties to the action.[51] This amendment was the result of the decision in *Cominex, Inc. v. Merchants Bank of New York,*[52] which held that to allow the third party to interpose such claim against a party already in the action would be to permit him to implead any of the original parties—a result held not to have been contemplated by the statute. Although this amendment was of some small benefit to the impleaded party, it failed to allow him to participate in the original action so that the rights of all parties thereto could be finally determined as the impleader statute intended.

In 1945 the Judicial Council proposed a series of sweeping changes in the impleader practice[53] and repeated its recommendations the following year.[54] The changes were adopted by the legislature in L. 1946 C. 671. The new impleader statute, C.P.A. Section 193a, attempts to overcome the effect of the rules of the *Nichols* and *Krombach* cases and to dispose of other defects which had become apparent in the prior impleader practice.

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By the provisions of the new section, paragraph 1, the original defendant becomes known as the "third party plaintiff" and the impleaded party as the "third party defendant."[55] Impleader continues to be permitted or denied at the court's discretion[56] but the third-party plaintiff no longer need apply to the court for leave to implead as was required under Paragraph 2 (Re-numbered Paragraph 3 in 1945) of

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51 L.1945, c.861, effective Sept. 1, 1945.

52 N.Y.L.J., Feb. 24, 1945, P. 725, (Sup. Ct., NY County).

53 Eleventh Annual Report of the Judicial Council of the State of New York, Legislative Document No. 15, Pp. 341-410, Williams Press, Inc., (1945).

54 See note 1, supra.

55 Dolan, Joseph F., Current Legislation—Pleading & Practice—Bringing Additional Parties into an Action, 21 St. John's L. Rev. 253-259, (1946). The author, expressing what might be termed high hopes indeed, states, (P. 255) "the terms, 'third-party plaintiff' and 'third-party defendant' are new to the Civil Practice Act and will bring refreshing clarity to the subject."

56 C.P.A. §193 A, ¶4.

the former Section 193. The advantages of this change are set forth by the Judicial Council.[57] Apparently it is felt that there is sufficient protection against false or groundless third-party actions in the requirement that the complaint in the third-party action shall be verified.

To overcome the effect of the rule of *Krombach v. Killian* and similar cases, the new statute allows impleader not only when the third-party defendant " . . . is or will be . . . " liable, as in the former practice, but also when the third-party defendant " . . . is or may be liable . . ."[58] The new Section 193a in effect shifts the burden from the third-party plaintiff of establishing a *prima facie* case of liability of the third-party defendant in order to secure the court's approval of the impleader[59] and places upon either the original plaintiff or the third-party defendant the onus of moving for the dismissal of the third-party action.

For the former requirement of identity between the causes of action or the grounds thereof, as laid down in the Nichols case, the new section substitutes the condition that the claim against the third-party defendant must be related to the main action by a question of fact or law common to both controversies, thus applying a rule of convenience instead of the former rigid rule that even the exercise of the court's discretion could not uphold impleader where there was an absence of the required identity.

As a concession to the arguments against liberal impleader, the statute allows the court to dismiss the impleader without prejudice, to order a separate trial or to grant other appropriate relief in cases where the determination of the main action would be unduly delayed[60] or where the third-party action might involve prejudice to any party in the main action.[61] The latter clause apparently will allow the courts to deny

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57 Judicial Council, 12th Annual Report, Pp. 200-201, Paragraphs (a) to (e) inclusive.

58 C.P.A. Section 193 A, Paragraph 1, compared with former Section 193, Paragraph 2 (Renumbered Paragraph 3 by L.1945 c.861). Federal Rule 14, the impleader rule, reads, ". . . is or may be liable. . ."

59 Hotel Antlers, Inc. v. Standard Oil Co. of N.Y., 144 Misc. 781, 259 N.Y.S. 351 (1932).

60 The requirement that the third-party action should not delay determination of the original controversy was also included in former C.P.A. Section 193, Paragraph 5 (Renumbered Paragraph 6 by L.1945 c.861).

61 C.P.A. §193 A, ¶4.

impleader of an insurance company and may have been included in the statute to forestall opposition by insurance interests to the 1946 changes.[62]

Paragraph 5 of Section 193a bears upon the rule of the *Nichols* and *Parness* cases and by allowing special findings as to the grounds of the liability of the third-party defendant to the third-party plaintiff, attempts to overcome the objection that from the jury's verdict for the original plaintiff in the main action it might be impossible to tell whether it was based on grounds which would support the third-party plaintiff's recovery against the third-party defendant.

To remedy the defects in the prior impleader practice resulting from the anomalous position of the impleaded party, who was "half-in, half-out" of the main controversy, and who could re-litigate the issues determined in that controversy, thus defeating one of the chief purposes of impleader (the avoidance of multiplicity of actions, and the determination of all issues at one time),[64] Paragraphs 2 and 3 of C.P.A. Section 193a give to the third party defendant all the rights previously denied him under the old practice. The impleaded party is made a true party to the action; he may assert any defenses against the original plaintiff that either he or the third-party plaintiff may have. If the original plaintiff so amends his complaint to assert any claim against the impleaded party (thus, in effect joining the impleaded party as a defendant), the latter may then assert a counterclaim against the original plaintiff. The statute specifically gives the impleaded party the rights of a party adverse to the original plaintiff to contest the latter's claim against the original defendant, including the right to appeal.[65] Finally, the impleaded party may himself implead a fourth party liable over to him for part or all of the claim in the third party action.[66] The original plaintiff is also allowed by the statute to implead third persons liable for part or all of any

62 Judicial Council, 12th Annual Report, P. 201, Footnote 37.

63 See note 49, supra.

64 See notes 43-46, supra. See sentence 4 of Federal Rule 14 (a).

65 C.P.A. §193 A (2). Compare with Federal Rule 14 (a), sentences 2 and 3.

66 C.P.A. §193 A (6). Compare Federal Rule 14 (a) sentence 6. See also, Occhipinti v. Buscemi, 71 N.Y.S. 2d 766 (1947).

counterclaims made against him.[67] The close relation between the practice authorized by the entire section 193a and those stated in Federal Rule 14 is obvious and needs no lengthy discussion or comparison.[68] J.H.M.

A SURVEY OF SIGNIFICANT CHANGES IN THE NEW YORK REAL PROPERTY LAW, 1941-1948

Tenure of Real Property (Article 2)

Prior to 1944, an alien enemy could not inherit real property, and no one, not even a citizen, could inherit real property from an alien enemy. The consequence of these disabilities was that upon his death, the real property of such an alien would escheat to the State for failure of heirs, whether acquired before or after the outbreak of war. These disabilities of the common law had their origin in the English law at a time when the State needed protection against alien enemies. Since the necessary protection is now afforded by the Trading With the Enemy Act[1] administered by the government of the United States, the need for the restrictions imposed by the State no longer exist. In order to correct this situation, the legislature amended subdivision 2 of §10 of the Real Property Law by omitting "friends" after the word "alien," thereby enabling alien enemies, their heirs and devisees, to take, hold, transmit, and dispose of real property within the state in the same manner as citizens and alien friends.[2] Control of the property of alien enemies is thus left to the Federal government and its statutes.

Estates—Creation and Division (Article 3)

Before 1946, a trust created in whole or in part in real property by employers in favor of employees might have been declared invalid because of the existing Rule against Perpetuities. The creation of such trusts as part of pension,

67 C.P.A. Section 193 A (6) almost identical in wording with Federal Rule 14 (b).

68 See notes 64-67, supra. See also Judicial Council, 12th Annual Report, P. 194 et. seq.

1 50 U.S.C. App. §§7, 32.

2 L. 1944, c. 272.

disability, or death benefit plans has become a more common practice during and since the war period. In order to protect the validity of this type of trust, the legislature amended §42 by adding §42a which expressly provides that such a trust shall not be deemed to be invalid as violating any existing laws against perpetuities or suspension of the power of alienation.

At the same time a new paragraph was added to §61 making possible the accumulation of income, rents, and profits from such a fund until the employer should deem them sufficient to accomplish the purposes of such plan.[4]

Conveyances (Article 8)

Prior to 1943, one could not convey real property to himself and another without going through a "straw" party. In order to make this roundabout procedure unnecessary, a new subdivision was added to §240 in 1943 authorizing a new form of conveyance.[5] §240b now provides that a holder or holders of real property, having the power to convey, may make a conveyance naming himself or themselves and another person or persons as grantees, and the conveyance has the same effect as if it were from a stranger to the named grantees. It also authorizes a similar conveyance by two or more persons naming one, or more than one, or all of such persons as grantees.

Originally §259 provided that an executory contract for the sale or lease of real property was unenforceable unless some note or memorandum thereof was in writing and signed "by the party to be charged." When the Revised Statutes were adopted in 1828 this provision was changed so that it required the writing to be signed by "the grantor or lessor." Reverting to the rule obtaining prior to the adoption of the Revised Statutes, the legislature in 1944 amended §259 to require that the writing be subscribed by the "party to be charged" instead of by the "lessor or grantor."[6] Thus the

3 L. 1946, c. 701, §1.
4 L. 1946, c. 701, §2.
5 L. 1943, c. 362.
6 L. 1944, c. 198.

rule of *300 West End Avenue Company v. Warner*,[7] interpreting former §259 as requiring subscription of the lessor or grantor to create a contract enforceable against the lessee or grantee even though the latter's signature appeared thereon, has been overcome. As the law now reads, while the grantee or lessee as defendant can invoke the statute by claiming the lack of his signature he cannot do so as plaintiff. §259 now conforms with other Statutes of Frauds.[8]

Before 1941, a conveyance of land was void under §260 if at the time of delivery of the deed the property was in possession of one claiming adversely to the grantor. Penal statutes had also been enacted to punish the parties to such transfers.[9] However, the Civil Practice Act in §994 nullified the latter as well as the effect of §260, by providing that the grantee in such a conveyance might bring a suit against the adverse holder in the name of the grantor. Because the older statutes were deemed obsolete and inconsistent with modern principles of real property, the legislature amended §260 in 1941 so that now the fact that real property is being held adversely to the grantor at the time of conveyance is no longer per se even a technical obstacle to a valid transfer.[10] The section as it formerly read did not invalidate mortgages of real property in similar circumstances, hence, in that aspect there is no change brought about by the amendment.

Prior to 1941, a sealed instrument could not be modified by an oral executory agreement. The presence of a seal on an instrument also dispensed with the necessity of consideration where its function was so intended by the parties.[11] However, in 1941, §342 of the Civil Practice Act was enacted, its result being to completely abolish the effect of the seal except as a means of authenticating instruments. At the same time, the legislature, in order to preserve some of the desired advantages which the seal formerly carried with it, amended several sections of and added new sections to the Real Property Law.

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7 300 West End Avenue Co. v. Warner, 250 N.Y. 221, 165 N.E. 271 (1929).

8 Pers. Prop. Law, §§31, 85

9 Penal Law, §§2031, 2032, 2033.

10 L. 1941, c. 317, §1.

11 Cochran v. Taylor, 273 N.Y. 172, 7 N.E. 2d, 89 (1937).

A new §282 was added,[12] providing that a written instrument which contains a provision that it cannot be altered orally can only be changed, modified, or discharged by an executory agreement in writing and signed by the party against whom the change, modification, or discharge is sought to be enforced, or by his agent authorized in writing.[13] This new section provides a substitute for the seal as a means of guarding against oral executory modification of written instruments.[14]

Since the presence of a seal could no longer create a presumption of consideration, a substitute was needed. §283, which was added in 1944, makes possible the creation of binding promises or warranties by the grantor in a deed or conveyance of real property although they were given without consideration, as long as no consideration was intended.[15] Delivery and acknowledgement of the deed in such cases should be sufficient evidence of that intent.

Several amendments to already existing statutes were also made in this connection in 1941.[16] Subdivision 2 was added to §279 changing the old rule that a promise is enforceable if the consideration is passed or executed. Such a promise is now enforceable if the promise and consideration are expressed in writing, signed by the promisor or his agent, and if the consideration would have been valid but for the time when it was given or performed. Subdivision 3 was added to §279 making an assignment of a chose in action irrevocable notwithstanding the absence of consideration, provided such assignment is in writing and signed by the assignor or his agent. Subdivision 4 was added to §279, and makes irrevocable a written offer to enter into a contract which states that the offer is irrevocable, notwithstanding the absence of consideration for the assurance of irrevocability. Subdivision 5 was added in 1944 and provides that an agent must be au-

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12 L. 1941, c. 329, §4.

13 Last clause added by L. 1944, c. 588, §4.

14 Morris Glasser & Son, Inc. v. Jonwal Construction Co., Inc. 186 Misc. 253, 60 N.Y.S. 2d 25 (1946).

15 L. 1944, c. 250.

16 L. 1941, c. 331, §§1, 2; c. 330, §2; c. 328, §2; c. 329, §4.

thorized in writing in order to execute any agreement, promise, assignment, or offer required by §279 to be in writing.[17]

A less significant amendment to the law concerning conveyances was enacted in 1943.[18] Subdivision 2 of §298 was amended to add "an attorney and counsellor-at-law exercising the powers of a notary public" to the list of officers before whom may be made an acknowledgement of proof within the state, of a conveyance of real property situate in this state.

Mortgages (Article 8)

Prior to 1946, §250 provided that the distributee or devisee of real property subject to a mortgage or other charge must satisfy that mortgage or other charge out of his own property, without resorting to the administrator or executor of the decedent unless there was an "express intention" in the will that the mortgage or other charge be otherwise paid. In 1946, §250 was amended to provide that where real property, subject to a mortgage or other charge, executed by an ancestor or testator is distributed or devised to two or more persons the interest in the real property so devised or distributed to each of these persons, shall, as between such distributees or devisees, bear its proportionate share of the mortgage or other charge.[19] This amendment also dropped the "express intention" requirement and substituted "a direction, expressly or by necessary implication" that it be otherwise paid. The purpose of the amendment was to harmonize the statute with §20 of the Decedent Estate Law which is concerned with charges upon personalty bequeathed under a will.

Recording Instruments (Article 9)

Recent amendments abrogate the rule of *Conley v. Fine*,[20] a 1919 decision in which it was held that future rent is not an interest in land and that, consequently, an assignment of

17 L. 1944, c. 588, §2.

18 L. 1943, c. 301.

19 L. 1946, c. 265.

20 181 App. Div. 675, 169 N.Y. Supp. 162 (1919).

rent is not a conveyance within the meaning of §291 calling for the recording of conveyances of property interests. Such a ruling gave rise to questions as to the validity of an assignment of rent against subsequent purchasers or mortgagees of the land from which the assigned rent arose. The only decision which passed upon the question held that an assignment of rent, whether recorded or not, was effective against a subsequent purchaser of the land without notice.[21] The inequities of such a situation were apparent, yet, a contrary rule would have merely shifted, not eliminated, such inequities.

A new §294a, added in 1944 and amended in 1948, answers the problem by providing that assignments of rent may be recorded in the same manner and with the same effect as other conveyances provided for in §291.[22] This section as added in 1944 spoke only of rents to accrue from "existing tenancies," but as amended in 1948 includes rent to accrue from "leases or subleases" as well. It was felt that the earlier language of the section might exclude cases where rents were reserved or contracted for in a lease which existed at the time the rent was assigned but which lease was to begin at a future date and there was, therefore, no "existing tenancy."

It is to be noted that the section is still limited to assignments of rent under "existing" leases. It does not purport to include equitable assignments of rent under a lease to be made in the future, nor does it embrace the analogous situation where a mortgagee in possession upon default makes application of the rent to the mortgage debt.

Quieting Title to Real Property (Article 11)

Sections 360 and 361 provide for a special proceeding to establish title to real property where the plaintiff has been for a certain period of time in possession under a lost or destroyed sheriff's or referee's deed, and where the defendants who had been named in the action in which the decree giving rise to the deed was made, or those who might claim under

21 Rolandelli v. Stanton, 129 Misc. 270, 220 N.Y. Supp. 502 (1927).

22 L. 1944, c. 262. The same chapter also amended or added §§291, 294, 315, 316, 321a, 329 to conform with the new §294a. §294a, subd. 1, amended by L. 1948, c. 210.

them, are dead or unknown. Since April 22, 1946, the period of time which the plaintiff is required to have been in actual possession in order to maintain the action is 15 years instead of the 30 years previously required.[23]

Action to Compel the Determination of a Claim to Real Property (Article 15)

At common law ejectment was the time-honored method of determining title to real property. The unavailability of this action to parties in possession led to the enactment of §500 of the Real Property Law which provided for an action, similar to ejectment, in which such parties in possession could have declared invalid any adverse claims advanced, or "which it appears from the public record, or from the allegations of the complaint" might be advanced by others.

Subsequent amendments considerably broadened the scope of §500 but in 1943, the Law Revision Commission reported: "The usefulness of the procedure is still limited by failure of the statutes to cover certain important situations and by the retention in the statute of arbitrary limitations."[24]

The recommendations adopted by the legislature in 1943 required an entire re-writing of §500. The new section: (1) Omits entirely the requirement that the plaintiff, to maintain an action, must "have been for one year in possession of the land," (2) Renders the action maintainable by one claiming an interest as well as an estate, (3) Alters the former limitation that, in order to maintain the action where the plaintiff's estate is for a term of years, the term must be of 10 years or more; it provides instead that the action may be brought unless the *unexpired* balance of plaintiff's term is less than five years, (4) Renders the action maintainable by an executor or administrator, (5) Abolishes the provision that where the adverse claim of the defendant is to an estate for years the estate must be for a term of 10 years or more, (6) Abolishes the provision that the validity of liens and incumbrances of a value of less than $250 may not be determ-

23 L. 1946, c. 961.

24 Law Revision Commission, 1943 Report, Recommendations and Studies, p. 243.

ined, (7) Abolishes the judicially-imposed restriction that the invalidity of liens and incumbrances will not be declared where the invalidity is apparent on their face,[25] (8) Declares that the action may be maintained even though "the court may have to determine the death of a person, or any statutory limitation of time, or any question of fact or law . . . "[26]

As a result of these changes, the statute now additionally embraces: cases where an action of ejectment would lie; cases where the plaintiff claims an expectant estate, a lien, or an interest not amounting to an estate; and cases where an adverse claim is asserted by some person not in possession of the property. The inclusion of an executor or administrator as a party who may institute the action is intended to remedy the situation where the settlement of an estate is unduly delayed by the existence of claims apparently adverse to the title of the decedent in the property to be sold or distributed.[27]

A further addition to §500 was made in 1948[28] overcoming the rule[29] that a mortgagor could not use the Statute of Limitations as the basis of affirmative relief to enable him to cancel a mortgage of record. The 1948 addition now specifically allows an action to be brought to extinguish and cancel

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25 Kothe v. Wilson, 45 N.Y. Supp. 649 (1896); Hall v. City of Lockport, 90 Misc. 429, 153 N. Y. Supp. 298 (1915).

26 This provision is included in order to make it absolutely clear that the procedure is intended to permit final determination of claims, no matter what issues of fact or law arise.

27 In order to give effect to the changes made in §500 by L. 1943, the remaining sections of Article 15 were amended, revised or repealed. Several sections were also renumbered. In view of the abrogation of the requirement of possession, provision was made that, in any event, the person in possession, and the one under whom he claims be made a party (§501, subd. 1). The court is also given power to direct that any person who it appears may have an estate or interest be made a party (§501, subd. 2); and, in cases where an estate or interest is so limited that there are neither certain nor presumptive owners in being at the commencement of the action, the court is given power to appoint a guardian ad litem to protect these interests, the judgment being made binding thereafter upon such interests (§§503, 507).

28 Subd. 4, added by L. 1948, c. 105.

29 Such a rule was announcced in Daly v. Benson, 73 N.Y.S. 2d 859 (1947). Plaintiff, in this case, asked for cancellation of a mortgage, asserting that he had paid no interest for fifteen years and that the whereabouts of defendant-mortgagee were unknown. The court refused relief, stating: "A Statute of Limitations cannot be made the basis of affirmative relief. It is a shield, not a sword."

recorded evidence of claims based on a mortgagee's or vendor's lien upon which the Statute of Limitations has run, provided the mortgagee or holder of the vendor's lien, or their successors, are not in possession at the commencement of the action.[30]

Action for Waste (Article 16); Proceedings to Foreclose a Mortgage by Advertisement (Article 17)

In line with a series of recommendations by the Law Revision Commission, in 1947, concerning the valuation and satisfaction of interests in real property[31] amendments were made to Section 538 and Section 560.[32] These amendments are properly understood only in conjunction with concurrent amendments in the Civil Practice Act.[33] In general they provide that where there is a recovery of fee damages by the owner of a possessory estate for life or for years[34] or, where surplus moneys have resulted from a sale in an action to foreclose a mortgage,[35] the tenant for life or for years is entitled to receive either a sum in gross or the earnings of a sum invested for his benefit. The determination as to whether a sum in gross or the earnings of a sum shall be awarded is made governable by the provisions of §1053a of the Civil Practice Act relating to the proceeds of a sale in partition.

The general purpose of the amendments is to remove uncertainties as to whether there may be an award of a lump sum in compensation for property interests, where there are multiple interests involved.[36]

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"The situation thus presented is indeed a curious one."[37] Such a statement by Professor Rothschild is indicative of the opinion which led to the addition of a new section, 539, to

30 It is to be noted that the section does not purport to make a change in the law in respect to the debt itself.

31 1947 Legislative Document, No. 65 (M); 1947 Report, Recommendations and Studies.

32 L. 1947, c. 849, §§3, 6.

33 C.P.A. §§1053-a, 1082-a, 1088-a; Condemnation Law §22.

34 §538.

35 §560.

36 For a complete study of this matter, See 1947 Legislative Document, (1947), No. 65 (M), 1947 Report, Recommendations and Studies.

37 Rothschild, The Simplification of the Civil Practice in New York, (1923), 23 Col. L. Rev. 618, 623.

Article 16.[38] The new section aligns New York with overwhelming weight of authority in the country by providing: "An action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land."

The "curious situation" which this amendent remedies was brought about by the Court of Appeals' holding in *City of Syracuse v. Hogan*[39] that an action for an injunction against an encroachment was, in essence, an action to recover real property, and as such, under the Civil Practice Act required a jury trial. The decision, while not clear on the point itself, was soon interpreted[40] as precluding the granting of an injunction for the removal of encroaching structures. Hence, a landowner in such a case was left in the predicament of being required to remove the encroachment himself, in which event he would be liable to the defendant for injury to other portions of the building, or of bringing ejectment.[41] If he used the latter remedy, he would usually find the sheriff offering the same objection against executing the judgment as had made impractical a removal by the landowner: that is, risk of injury to the remaining portions of the building. Hence, in most cases, the judgment would be returned unexecuted.[42]

The amendment restores the rule existing in New York for 100 years prior to the *Syracuse v. Hogan* decision and the rule existing in substantially all other jurisdictions. The equities of the amendment are apparent. As stated by Justice Cardozo, dissenting in the *City of Syracuse* decision: " . . . An owner is entitled to the remedy that will place the risk and the cost upon the shoulders of the wrongdoer."

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38 L. 1942, c. 321.

39 234 N.Y. 457, 138 N.E. 406 (1923).

40 Johnson v. Purpura, 208 A.D. 505, 203 N.Y. Supp. 581 (1924).

41 There was also a highly unsatisfactory third course, that of bringing actions for damages at intervals of time and allowing the encroachment to continue.

42 In City of Syracuse v. Hogan, Justice McLaughlin suggested a remedy for this situation: "If it (the judgment) cannot be enforced by execution, then the defendant may be punished for contempt in refusing to comply with the judgment." The Law Revision Commission which recommended the present amendment did not question the adequacy of this remedy, but did question its availability: "It is submitted . . . that a judgment in an ejection action does not furnish the basis for contempt proceedings." 1942 Report, Recommendations and Studies, pp. 84-85.

The amendment further provides for exercise of the court's discretion in awarding other relief;[43] and leaves existing statutes having to do with minor encroachments unaffected.[44] E.H.G. and J.V.E.

RECENT DEVELOPMENTS IN NEW YORK TESTAMENTARY AND NON-TESTAMENTARY SUCCESSION[1]

Non-testamentary Succession

An amendment to Section 17 of the Decedent Estate Law[2] which covers devises and bequests to various types of associations changes the method of computing the value of an annuity or life estate when the gift to the association is postponed. The statute now provides that the value of such an annuity or life estate shall be computed upon the actuarial value, according to the American Experience Table of Mortality, at the rate of four per centum per annum. The provision previously in effect provided for computation at five per centum per annum.

Section 18 subdivision 9, which relates to the waiver of the right of election of the surviving spouse against or in absence of testamentary provision, has been amended[3] to " . . . provide a single comprehensive statement of the requisites of a valid waiver . . . . "[4] Generally the new amendment provides that the waiver will be effective when the waiver is " . . . subscribed by the maker thereof and either acknowledged or proved in the manner required for the recording of a conveyance of real property."

43 "Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify." N.Y. Real Prop. Law §539 (1).

44 "This section shall not be deemed to repeal or modify any existing statute or local law relating to encroaching structures." N.Y. Real Prop. Law §539 (2).

1 This is a brief survey of statutory changes and interesting decisions affecting the laws of succession in New York during the period 1942-1948. For comprehensive survey of statutory developments from 1938 to 1944 affecting the New York Decedent Estate Law, see Vol. 20 N.Y.U.L.Q. Rev. 191 (1944).

2 L. 1947, C. 848, Sec. 2, eff. April 14, 1947.

3 L. 1947, C. 379, eff. March 25, 1947.

4 1947 Leg. Doc. No. 65 (A).

Section 89, relating to the "disposition of property where there is no sufficient evidence that persons have died otherwise than simultaneously," has been added effective September 1, 1944.[5] This statute, governing situations where title to property or the devolution thereof depends upon priority of death and the priority is impossible of determination, provides that the property shall be disposed of as if each had survived the other, in the absence of a contrary dispositive testamentary provision.[6]

Testamentary Succession

Substantial revision of Section 16 became effective on May 6, 1942.[7] This statute now provides for the nuncupative and holographic wills of soldiers and sailors while in actual military or naval service, and by mariners while at sea. The effects of the amendments are discussed at length in an article, entitled "Soldiers' and Sailors' Wills in New York," appearing in the June 1948 issue of the *Albany Law Review* and continued in the present volume.

Section 27, which covers a devise or bequest to a subscribing witness, has been amended[8] "to prevent the circumvention of the statute in the manner outlined in *Matter of Walters.*"[9]

Matter of Walters[10] held that if one of two witness-beneficiaries removed himself from the jurisdiction, even though for the sole purpose of avoiding the operation of the statute, the will could be proved under section 142 of the Surrogate's Court Act which provides for the proof of wills in the event of death or absence of witnesses, and held that the bequest or devise to such absent witness should be valid. The amendment provides that no subscribing witness may now take more than an intestate's share unless there are two other subscribing witnesses who are not beneficiaries.

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5 Added L. 1943, C. 479; amended L. 1944, C. 172, eff. September 1, 1944.

6 See In re Dunham's Will 188 Misc. 1027, 69 N.Y.S. 2d 571, 69 N.Y.S. 2d 572. (1947).

7 L. 1942, C. 688, Sec. 1, eff. May 6, 1942.

8 L. 1942, C. 662, eff. May 3, 1942.

9 Drafters Memorandum.

10 285 N.Y. 158, 33 N.E. 2d 72 (1941).

Section 47d,[11] added effective April 1, 1947, provides that "if the personal property of a testator is insufficient for full payment of his general legacies so much of his real property not specifically devised as shall be necessary for payment of the balance shall be sold and the proceeds used for such payment unless the will shall contain an express direction to the contrary." This provision applies only to wills executed after August 31, 1947. The purpose of the enactment of this section was " . . . to abrogate the long-standing rule that general legacies are chargeable only against personal property and are never a charge against realty unless the will directs or implies such charge . . . ."[12]

This section demonstrates a realistic recognition of usual testamentary intent, and is designed to give effect to that intent.

DECISIONS

Decisions appearing in the period covered by this article do not indicate much change in the interpretation of existing statutes. However, the following cases have been selected on the basis of their unusual nature.

Non-testamentary Succession

Right of Election

The matter of the right of election by the surviving spouse continues to provide cases involving the effect of trusts, insurance policies, and bank accounts. Cases involving the surviving spouse's right of election under Section 18 continue to present problems similar to those found in *Newman v. Dore*[13] which involved an illusory trust in fraud of a widow's rights in her decedent's estate.

A Supreme Court case,[14] in an action brought by a widow, held "illusory" a transfer of stock by the intestate in a corporation owned entirely by him, which he continued to

11 L. 1947, C. 521, eff. April 1, 1947.

12 Draftsman's note.

13 275 N.Y. 371, 9 N.E. 2d 966. (1937).

14 Marano v. Lo Carro, 62 N.Y.S. 2d 121, (1946) aff'd on appeal 270 A.D. 999, 63 N.Y.S. 2d 829 (1946).

manage, and from which he obtained his support, and permitted the widow to claim her intestate share.

Interesting in this connection is a 1941 case, *Krause v. Krause*,[15] which held that a savings bank account, established three years before his death by the testator "as trustee for Anna Severin," his daughter, was illusory as against his widow; but held warranty deeds of land to his sons, subject to a life interest in himself, valid inter vivos transfers.

The right of election, under Sections 17 and 18, has been held to be a personal right. Cases involving the exercise of this right illustrate this rule.

Matter of Plaster[16] involved the interpretation of Section 17 which provides that a charitable devise or bequest of more than one-half of a decedent's estate "may be contested only by a surviving husband, wife, child, descendant, or parent." Here the children of a son of a testator contested the validity of a gift of more than one-half of a decedent's estate to a religious corporation. The son of the testator had died a few weeks after the testator without contesting the validity of the gift. It was held that the right was personal to the son and that the grandchildren, as descendants, were without standing in the court. It may be seen that the son's right of election did not pass to his children and further that the courts are loathe to extend a statute which is in derogation of testamentary liberty.

In re Ward's Estate,[17] which involved an election situation, held that the election to take an intestate's share, under Section 18, must be executed and notice served, filed and recorded during the lifetime of the surviving spouse in order to preserve it. The election cannot be executed, nor notice served or filed or recorded after the death of the surviving spouse by the executor or administrator of his estate.

Bearing on this problem is the case of *Matter of Zalewski*.[18] The court held here that the Polish Consul in New York had the power to exercise the right of election in behalf of the

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15 285 N.Y. 27, 32 N.E. 779 (1941).

16 179 Misc. 80, 37 N.Y.S. 2d 498 (1942), 266 A.D. 439, 43 N.Y.S. 2d 1 (1943), aff'd without opinion 239 N.Y. 822, 59 N.E. 2d 181 (1944).

17 73 N.Y.S. 2d 456 (1947).

18 292 N.Y. 332, 55 N.E. 2d 184 (1944).

surviving widow where a treaty between the United States and Poland gave the Consul power to represent absent Polish nationals in proceedings in the Probate Court as if he had the power of attorney.[19]

Pretermitted Children

The decision rendered in *In re Robinson's Estate*[20] held that insurance, bonds, and savings accounts, provided after the execution of the will for an after-born child, did not prevent the child from claiming his intestate's share and that only settlements or other provisions made contemporaneous with or prior to the execution of the will shall constitute sufficient provision for the after-born child.

This case was followed in *Estate of Kirk*.[21] Prior to the execution of his will the testator had taken out an insurance policy which named his wife as life beneficiary with power to invade the principal. At her death, any of the remaining principal was to be paid to "the children or child of the insured." The children were also named as contingent beneficiaries in the event that the wife predeceased the testator. The court held that this policy made sufficient provision for after-born children not named in the will.[22]

Anti-lapse Statute

The effect of Section 29, which provides that a devise or bequest to child or descendant, or to brother or sister of the testator is not to lapse, is seen in relation to adopted children

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19 Federal treaties with foreign governments are the law of the land and are binding on all courts. This decision would seem to be in the nature of an application of this rule, and should be considered as such rather than an exception to the statute and to the line of established precedents in New York. See United States Const. Art. 6 (2).

20 188 Misc. 720, 66 N.Y.S. 2d 705 (1946).

21 191 Misc. 473, 80 N.Y.S. 2d 378 (1948).

22 Cf. In re Kreutz' Will, 49 N.Y.S. 2d 402 (1944). Here designation of the widow as guardian "of any of my children" not of age was sufficient provision for after-born children where the testator had only one child at the time of execution of the will. Matter of Kraston, 58 N.Y.S. 2d 364 (1945). Testator left a daughter unprovided for by will or by settlement made prior to the execution of the will. However, he made the daughter the sole beneficiary under a policy of insurance which he caused to be taken out after execution of the will. The Surrogate held that this constituted a settlement within the meaning of section 26.

in *In re Fedder's Will.*[23] The testator provided that his estate should be paid at the death of the life beneficiary in equal shares to certain named brothers and sisters "per stirpes and not per capita." One of the named persons predeceased the life beneficiary but was survived by an adopted child who had been adopted 17 years before the will of the testator had been executed. The Surrogate held that the adopted child was the descendant of the deceased foster parent within the meaning of the statute and that the child is entitled to take by representation that part of the remainder which would have been paid to his foster father had he survived the life beneficiary.

Testamentary Succession

Execution

In re Schmitt's Will[24] held valid the will described in the following situation. The testatrix' signature and those of the subscribing witnesses appeared on the fifth page of the will which consisted of seven pages. The attestation clause appeared on the sixth page; the seventh page was a diagram purporting to show the division of certain real property bequeathed in other parts of the will. A statement appeared, prior to the signatures on the fifth page, to the effect that this diagram was incorporated as a part of the will "with the same force and effect as if it were herein contained." The testatrix' signature appeared below the diagram on the seventh page, but the signatures of the subscribing witnesses did not. The court held that the parts of the will prior to the signatures on the fifth page completely disposed of the real property without recourse to the diagram, and that the diagram's attempted incorporation did not make it a part of the will. The will ended at the fifth page, the testatrix and the witnesses subscribing at the end thereof. The signature at the end of the diagram on the seventh page was without legal effect.

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23 187 Misc. 201, 61 N.Y.S. 2d 340 (1946).

24 187 Misc. 409, 61 N.Y.S. 2d 569 (1946).

In a probate proceeding, *Matter of Allen*,[26] the will offered for probate contained an attestation clause in the usual form. Subscribing witnesses testified at the probate proceeding that the testatrix' signature did not appear on the will when they signed. The Surrogate denied probate, saying that since not more than six months had elapsed between the date of the purported execution and the giving of their testimony, the recollection of the witnesses of what had occurred should prevail over the formal recitals in the attestation clause. Nothing in the evidence removed the probability that the testatrix signed out of the presence of the witnesses after they had signed.

Incorporation by Reference

New York continues to repudiate the doctrine of incorporation by reference. In *Matter of Welcke*,[27] the court rejected as void and denied probate of an unattested holographic letter attached to a will and referred to by the will.[28] However, the Surrogate observed that one of "the prerequisites to the incorporation by reference in a will is that the writing sought to be incorporated be clearly identified and of a variety which excludes reasonable possibility of chicanery or mistake."[29]

Reference in a will to a trust fund which was to be established subsequent to the execution of the will by the testator, in which the testator directed his executor to pay over residue of his estate to this trust fund was held invalid.[30] The court, in an action to recover funds paid over to this trust fund by the executor, declared that the reference is invalid and of no effect as the trust agreement was not in existence at the time the will was executed and that the assets mistakenly paid over to the trustees should be returned to the executor.

However, the doctrine of incorporation by reference has not been completely rejected by the New York courts. In

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26 120 N.Y. Law Journal (August 31, 1948) 193.

27 33 N.Y.S. 2d 735 (1942).

28 Cf. In re Schmitt's Will, note 24, supra.

29 See also Matter of Rausch, 258 N.Y. 327, 179 N.E. 755 (1932).

30 Bennet v. Mattox, 110 N.Y. Law Journal (September 28, 1943) 723.

Matter of LeCollen,[31] the testatrix bequeathed the "contents of certain envelopes now in my safe deposit box" in a named bank. She stated, "The envelopes have the names of the persons whom I desire to receive them," and listed five names. Six envelopes, all of which contained securities, were found in the safe deposit box after the testatrix' death. Four of the six envelopes bore the names of four of the five persons named in the will. The court held that only the securities found in the envelopes bearing the names of the persons described in the will constituted a valid bequest. "Where . . . the will identifies the beneficiaries and the quantums of their benefits and resort to the names appearing on the envelopes is only for the limited purpose of identifying the specific envelopes containing the contents bequeathed, . . . the rule against incorporation by reference . . . is inapplicable."

Whether or not this decision should be considered as holding the rule of incorporation by reference in this situation "inapplicable" is debatable. It is submitted that, without resort to the names appearing on the envelopes, it would be impossible to carry out the bequest of the testatrix.

Revocation

Two cases involving the revocation of wills have presented interesting situations to the Surrogate's Court. The first case[32] concerned a testator who made a will in 1938 to which he made a codicil in 1941. He kept this codicil secret from his lawyer but, in 1943, he executed a second codicil which was prepared by the lawyer who drew the 1938 will. The 1943 codicil expressly referred to and republished the 1938 will. The question presented is whether or not the second codicil revoked the first codicil by implication. The Surrogate decided that the 1941 codicil was not revoked.

In the second case[33] the decedent executed three wills. The latest will completely disposed of her property but was not to be found after her death although it was in her pos-

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31 190 Misc. 272, 72 N.Y.S. 2d 467 (1947).

32 In re Van Ingen's estate, 183 Misc. 281, 47 N.Y.S. 2d 818 (1944).

33 The Estate of Marita M. Hunt, Westchester Co. Surr., 119 N.Y. Law Journal (May 7, 1948) 1728. Recent Decisions, June, 1948, p. 6.

session some time prior to her death. The Surrogate held that the latest will, disposing of all the decedent's property, impliedly revoked the two previous wills. As the latest will could not be found at her death, the decedent is presumed to have revoked it and therefore died intestate. The revocation of the latest will did not revive the two earlier wills.

Cases involving attempts on the part of testators to revoke their wills by making notations in the margins of the will, held the attempted revocations ineffective.[34] The statements of revocation were signed by the testator but were not signed by two witnesses in the presence of the testator. The testator failed to comply with the provisions of Section 34 because the statements of revocation were not executed with the same formalities required for the execution of a will and, as the writings did not in any way touch the written matter of the wills, it cannot be said that the will was cancelled or obliterated and therefore revoked.

Contractual Wills

In re Wentworth's Will[35] deals with the problem of the contractual will. The testator covenanted with his son in consideration of the payment of $50 a month for life until the death of the testator " . . . that he will devise . . . (his farm to his son) in his last Will and Testament in consideration of the faithful performance of this contract." The testator attempted to devise the property in a manner different from that which he had contracted. In probate proceedings, the son petitioned for determination of validity, construction and effect of the contract in question. The Surrogate held the decedent's real property, under his sealed and acknowledged agreement, vested in his son as of the date of the decedent's death. The portions of the will attempting to dispose of the property were held illegal, void and of no effect.

The contractual quality of joint wills is not as binding as the type described in the previous case. *In re Gudewicz'*

34 Matter of Wiktor, 51 N.Y.S. 2d 481 (1944). Matter of Berman, 185 Misc. 1037, 58 N.Y.S. 2d 512 (1945).

35 188 Misc. 174, 67 N.Y.S. 2d 584 (1947), aff'd 272 A.D. 974, 71 N.Y.S. 2d 542 (1947)

Will[36] held that a joint will does not raise a presumption that it is supported by a valid consideration which would support enforcement in the presence of a later will whose dispositive provisions were different than those of the joint will. The Surrogate said, "As a will, the instrument is revocable at pleasure, but as a contract if supported by an adequate consideration it is enforceable in equity."[37]

Custody of Wills

The Court of Appeals in *Scholen v. Guaranty Trust Company* [38] dealt with an interesting situation involving the custody of wills. The defendant trust company accepted the custody of a will with knowledge that it was named as executor and trustee. The testator died and the trust company failed to come forward with the will until over four years after his death, and after the assets of the decedent had been distributed as though he had died intestate. It was held that a duty or obligation to exercise care to discover the death of the testator or to come forward with the will, does not exist simply because of the bailment undertaking. However, such a duty may arise where it appears that representations, either express or implied, are made by the trust company that it maintains a highly specialized department whose function is to seek information concerning the death of a testator whose will it holds, and that it makes periodic checks in connection therewith, and that, after the death of the testator, it will enter upon its duties as exectutor or trustee. Attorneys beware! P.J.W., Jr.

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36 72 N.Y.S. 2d 838 (1947).

37 See also: Tutunjian et al. v. Verzigian et al., 64 N.Y.S. 2d 140 (1946). In re Rentall's Will, 60 N.Y.S. 2d 646 (1945)

38 288 N.Y. 249, 43 N.E. 2d 28 (1942). It was subsequently held that the cause of action accrued "on the expiration of a not lengthy period" after the testator's death had been publicly recorded. 292 N.Y. 1, 53 N.E. 2d 370 (1944).

RECENT CHANGES AFFECTING LIMITATION OF ACTIONS

The Legislature, in 1943, adopting the recommendations of the Law Revision Commission,[1] substantially amended Section 19 of the Civil Practice Act to effect four changes.

Codifying the rule of *Myers v. Credit Lyonnaise*,[2] the first sentence of the statute now expressly provides that where a defendant is without this State when a cause of action accrues against him, the running of the Statute of Limitations is suspended until he returns to or comes into the State. The *Myers* case held that the time limited for the commencement of an action was tolled by the defendant's absence from the State even though the defendant had never been within this State prior to the acrual of the cause of action and without regard to the residence of the plaintiff.

Prior to this amendment, the statute referred only to the absent defendant's "return" to this State. Despite the wording the statute, however, except for a brief period between 1928 and 1932,[3] the courts have consistently held that the tolling provisions of the statute contemplated the case of a non-resident defendant who had never before been within this State. It was so held by Chancellor Kent as early as 1808 in the case of *Ruggles v. Keeler*.[4] A long series of decisions followed, like in tenor, holding that the tolling provisions were applicable to absent residents and absent non-residents.[5]

By the second change in Section 19, the period of a defendant's absence from the State or concealment within the State necessary to toll the statute of limitations has been re-

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1 Leg. Doc. (1943) No. 65F.

2 259 N.Y. 399, 182 N.E. 61 (1932).

3 Garrison v. Newman, 222 A.D. 498, 227 N.Y. Supp. 78 (1928): In an action between non-residents, the Court admitted the New York limitation as a bar despite the fact that the defendant had never been within the state prior to the commencement of the action, observing that a contrary rule would lead to an absurdity in that, "the rights of action accruing outside the state between non-residents would be kept alive interminably and the courts of this State would be flooded with ancient, well-nigh forgotten rights." See also, Perlman v. Perlman, 235 A.D. 608, 257 N.Y. Supp. 48 (1932).

4 3 Johns 263, 3 Amer. Dec. 482 (1808). The Court reached this conclusion by accepting the English construction of the word "return" found in the Statute of Anne, upon which Section 19 was modeled.

5 Miller v. Brenham, 68 N.Y. 83 (1877); Ackerman v. Ackerman, 200 N.Y. 72, 93 N.E. 192 (1910); Olcott v. Tioga R.R., 20 N.Y. 210 (1859); Backus v. Severn, 127 Misc. 776, 216 N.Y. Supp. 381 (1926).

duced from one year to four months. This change was recommended by the Law Revision Commission[6] to lessen the hardship on plantiffs with causes of action governed by short time limitations.

A third change was effected in subdivision 1 of Section 19 to provide that the absence of the defendant from the State will not suspend the running of the statute of limitations while the designation of an agent upon whom summons may be served within this State remains in force, *irrespective of whether such appointment is voluntary or involuntary*, thus overcoming the rule of *Maguire v. Yellow Taxi Co.*[7]

Prior to this amendment, the subdivision provided that the statute of limitations would be tolled during any period of effective designation of an agent for the service of summons within this State. The Court of Appeals interpreting this statute in the *Maguire* case drew a distinction between a voluntary and an involuntary appointment of an agent, holding that the three-year statute of limitations was suspended during the absence of the Connecticutt defendant despite the fact that effective service could have been made at any time by serving the Secretary of State under Section 52 of the Vehicle and Traffic Law, and despite the fact that this was the method of service finally employed more than three years after the cause of action accrued.[8] The inequity of this rule was expressed in a dissenting opinion which pointed out that under the majority rule a plaintiff with such a cause of action could delay any number of years and then by serving the Secretary of State apprise the defendant of his claim for the first time when all likelihood of procuring witnesses or a defense had been lost by lapse of time.

The fourth change in the section was made in subdivision 2 so as to conform it with Section 229 which concerns service within this State on foreign corporations. The Legislature, by adding to the term "officers," the words "or other

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6 Supra note 1 (the recommendation of the committee was 60 days).

7 253 A.D. 249, 1 N.Y.S. 2d 749 (1938), aff'd 278 N.Y. 576.

8 Accord, City Co. of New York Inc. v. Stern, 110 F. 2d 601 (1940); Contra, Nelson v. Richardson, 295 Ill. App. 504, 15 N.E. 2d 15 (1938); Coombs v. Darling, 116 Conn. 643, 166 Atl. 70 (1933). (Note that the defendant in the Maguire case was accorded less favorable treatment than a New York resident would be in Connecticutt under similar circumstances).

persons" upon whom a summons for such corporation may be served, ended the incongruous situation of a foreign corporation's being amenable to process under Section 229 because of the presence within this State of a cashier, managing agent or director, and yet having the statute of limitations tolled because no corporate officer was within this State.

Significant changes were also effected in Section 13 and Section 55 of the Civil Practice Act by the 1943 amendment. In revising these statutes, the Legislature was confronted with a series of conflicting decisions reflecting a long, interesting development of the applicability of conflict of laws principles to the statute of limitations. Many of the problems and divergent views prevalent prior to 1943 were set to rest when the Legislature, acting on the recommendations of the Law Revision Commission, adopted the theory of *National Surety Co. v. Ruffin*[9] and *Kirsch v. Lubin*[10] and rewrote the statutes so as affirmatively to express the doctrine that in no case may an action be brought in a court of this State after the expiration of the time limited by the laws of this State, and further that the only foreign limitation which may be pleaded in bar of an action brought in this State is the limitation imposed by the law of the State wherein the cause of action arose, and that this limitation may be pleaded only when the cause of action originally accrued in favor of a non-resident of this State.

In discussing the nature of the change affected by the Legislature it is necessary to separately examine Section 13 and Section 55.

The present Section 13 reads as follows, "Where a cause of action arises outside this State an action cannot be brought in a court of this State to enforce such cause of action after the expiration of the time limited by the laws *either of this State* or of the State or country where the cause of action arose, for bringing an action upon such cause of action, except that where the cause of action originally accrued in favor of a resident of this State the time limited by the laws of this State shall apply."

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9 242 N.Y. 413, 152 N.E. 246 (1926).

10 131 Misc. 700, 228 N.Y. Supp. 94 (1927), aff'd 223 A.D. 826, 228 N.Y. Supp. 825 (1928), aff'd 248 N.Y. 645, 162 N.E. 559 (1928).

Section 390a of the Code of Civil Procedure, the predecessor of Section 13 was adopted in 1902 as a legislative innovation on the then firmly established rule that statutes of limitation, being a matter of procedure rather than a matter of substance, were governed by the *lex fori.*[11] Section 390a was similar in effect to our present Section 13 with the exception that it was silent as to the applicability of the New York limitation when the action was not barred by the law of the State where the cause of action arose.

It was early decided in the case of *Isenberg v. Rainier*[12] that the effect of Section 390a was not to substitute the foreign limitation for our own but to impose it as a limitation in addition to our own. Under such a construction a cause of action which arose outside the State was unenforceable in a court of this State if the limitation imposed either by the law of this State or by the law of the State where the cause of action arose had run against it.

This general construction was adopted by a majority of subsequent cases[13] but throughout the years it was a subject of constant dispute. Particularly did certain dicta by Justice Cardozo in *Jacobus v. Colgate*[14] cast doubt upon the soundness of the *Isenberg* construction. If Justice Cardozo did mean to disapprove the rule adopted by the *Isenberg* case his views were disregarded by the later case of *Myers v. Credit Lyonnaise*[15] in which the Court of Appeals reiterated and unconditionally approved the construction placed upon the statute by the *Isenberg* case.

Any remaining doubt as to the validity of this construction was dispelled when in 1943 the Legislature codified this construction in the amendment to Section 13.

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11 Toulandon v. Lachenmeyer, 37 How. 145 (1869); Ruggles v. Keeler, supra note 3.

12 145 A.D. 256, 130 N.Y. Supp. 27 (1911).

13 Dalrymple v. Schwartz, 177 A.D. 650, 164 N.Y. Supp. 496 (1917); Dodge v. Halbrook, 107 Misc. 257, 176 N.Y. Supp. 562 (1919); Wand v. Lee, 256 N.Y. 653, 177 N.E. 179 (1931); Stern v. Auerbach, 203 A.D. 681, 197 N.Y. Supp. 295 (1922); contra, Mishawaka Woolen Mfg. Co. v. Phillips, 93 Misc. 224, 156 N.Y. Supp. 778 (1916).

14 217 N.Y. 235, 111 N.E. 837 (1916).

15 Supra note 2.

In furtherance of the purpose of clarifying the conflict of laws principles within the Statute of Limitations, the prior Section 55 was repealed by the 1943 amendment and a new Section 55 substituted in its stead. The present Section 55 reads as follows: "Except as provided by Section 13, an action upon any cause of action may be brought in a court of this State within the time limited by the laws of this State and not thereafter."

In rewriting this section, the Legislature overcame prior controversy as to whether or not the tolling provisions of Section 19 were affected by the former Section 55,[16] and as to whether or not the exception of Section 13 in favor of resident plaintiffs carried over into former Section 55.[17] Both these contentions were dispelled by the Court of Appeals in *National Surety Co. v. Ruffin*,[18] and the new section is merely expressive of that result.

The net result, therefore, of the changes effected in Sections 13 and 55 is that, where the plaintiff is a non-resident suing on a cause of action which arose elsewhere, suit must be commenced before the expiration of the time limited by either the New York or the foreign statute. In all other cases, the New York statute alone is applicable.

In 1942, the Legislature, taking note of the difficulties being experienced by the courts in determining whether a three, six or 10-year limitation was applicable to a particular stockholders' representative action, relieved many of the difficulties by the addition of a new subdivision 8 to Section 48 of the Civil Practice Act. This new statute provides in effect that an action by or on behalf of a corporation against a director, officer, or stockholder must be commenced within six years unless it is to recover damages for injury to property or for waste, in which case the action must be commenced within three years.

In the few years just prior to the adoption of this statute, the question of the time within which a stockholders' action must be brought underwent its most extensive development.

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16 Laurencelle v. Laurencelle, 107 Misc. 257, 176 N.Y. Supp. 562 (1919).

17 Whiting v. Miller, 188 A.D. 825, 176 N.Y. Supp. 639 (1919); accord, Ross v. Graham, 122 Misc. 574, 203 N.Y. Supp. 390 (1924).

18 Supra note 11. See also, Kirsch v. Lubin, supra note 9.

Prior to 1937, the rule was well settled that *all* such actions were purely of equitable cognizance and, therefore, all were governed by the 10-year limitation prescribed by Section 53.[19] In *Potter v. Walker*,[20] however, the Court of Appeals set aside this established rule, holding that a stockholder stood in no better position than the corporation which he represented and could enforce no claims which the corporation could not enforce. In this same year the time limited for the commencement of an action for injury to property had been changed by statutory amendment from six to three years. By virtue of this amendment and the decision in the *Potter* case it became necessary for the courts to examine each particular cause of action to determine the applicable limitation, and in so doing they were confronted with two distinct problems. The courts had first to determine whether an action at law would afford the plaintiff a full and complete remedy. If it would not, the 10-year limitation applied by virtue of the *Potter* case. If a complete remedy could be had at law, the courts were called upon to decide whether the action was in the nature of assumpsit for money had and received, in which case the six-year limitation would apply, or for injury to property, in which case a three-year limitation would apply.

Although the necessity of determining whether the action is legal or equitable was done away with by the enactment of subdivision 8, the problem of determining whether the action is for money had and received or for property injury was not affected. The courts' decisions on this point prior to the enactment of the statute are still the law and are expressive of the true construction of the statute.[21] These earlier decisions[22] established the rule that if the defendant

19 Brinkerhoff v. Bostwick, 99 N.Y. 185, 1 N.E. 66 (1885); accord, Hanna v. Peoples' National Bank, 35 Misc. 517, 71 N.Y. Supp. 1076 (1901), Continental Securities Co. v. Belmont, 168 A.D. 483, 153 N.Y. Supp. 1069 (1915), Chance v. Guaranty Trust Co., 164 Misc. 346, 298 N.Y. Supp. 17 (1937), cf. Chance v. Guaranty Trust Co., 256 A.D. 840, 841, 943, 9 N.Y.S. 2d 478 (1939), cf. O'Brien v. Fitzgerald, 143 N.Y. 377, 38 N.E. 371 (1894) (action by receiver of an insolvent corporation to recover for the malfeasance of director not exclusively an equitable action).

20 276 N.Y. 15, 11 N.E. 2d 335 (1937).

21 Gottfried v. Gottfried, 269 A.D. 413, 56 N.Y.S. 2d 50 (1945); see also, Myer v. Myer, 271 A.D. 465, 66 N.Y.S. 2d 83 (1946).

22 Corash v. Texas Co., 264 A.D. 292, 35 N.Y.S. 2d 334 (1942); Wagner v. Armsby, 264 A.D. 379, 35 N.Y.S. 2d 188 (1942);

director, officer, or stockholder made a direct profit from the transaction complained of so that the action is essentially one for money had and received, the six-year limitation is applicable despite the fact that some degree of waste of corporate funds or injury to corporate property is involved. On the other hand, if no direct profit is made from the transaction complained of, the action is necessarily grounded upon injury to or waste of corporate property and must be commenced within the three years after its accrual.

R.W.C.

Notes

THE RECURRING PROBLEM OF FOREIGN DIVORCES. One of the more troublesome problems that continually confronts the courts and the legal profession in general is the recognition which one State should or must grant to a divorce decree of a sister State involving domiciliaries or former domiciliaries of the first State. The whole question of divorce is more sociological than legal. Nevertheless, the modern fluidity of living, the Full Faith and Credit Clause of the United States Constitution, and the widely divergent attitudes as to divorce existing in the several States have combined to vex both courts and litigants. Despite the fact that many earnest and competent minds have endeavored to solve the problems involved, it is evident that a solution has not yet been reached as to either the sociological or the legal aspects. Our primary concern is with the legal aspects. The sociological aspects are a matter for the legislatures and the people. This fact has long been recognized and acknowledged by the courts.[1]

The problem itself can be easily stated by the following question: To what extent do the requirements of the Full Faith and Credit Clause of the Federal Constitution preclude a person from attacking collaterally in his own state a decree of divorce obtained upon constructive service of process by his spouse in another state?[2] The types of cases fall into two main categories:

First is the situation where the defendant spouse appears personally or by counsel in the divorce action.

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1 Kinner v. Kinner, 45 N.Y. 535, 6 Am. Rep. 132 (1871); O'Dea v. O'Dea, 101 N.Y. 23, 4 N.E. 110 (1885).

2 There are further ramifications which are omitted from the question because the fundamental issues are the same. e.g., see Williams v. North Carolina cases, 317 U.S. 287, 63 S.Ct. 207 (1942) and 325 U.S. 226, 65 S.Ct. 1092 (1945), which illustrate that the State itself may attack the foreign divorce in a criminal action for bigamy. See also Dean v. Dean, 241 N.Y. 240, 149 N.E. 844 (1925), which illustrates that the State will entertain a collateral attack brought by a person who lived outside the State prior to and at the time of the granting of the foreign divorce.

Second is the situation where the defendant spouse ignores the notice and fails to make an appearance.

In two companion cases recently decided, the United States Supreme Court has laid at rest any doubts which may have existed as to the conclusiveness of a divorce rendered after appearance by the defendant spouse. In *Sherrer v. Sherrer*,[3] the plaintiff brought an action in Massachusetts in which he alleged that he was the defendant's lawful husband, that the Florida decree of divorce obtained by the defendant was invalid and that the defendant's subsequent remarriage was void. The plaintiff had been the defendant in the Florida divorce action in which he had entered a general appearance and denied in his answer the wife's allegation that she was a bona fide resident of the State of Florida. But at the trial, neither the husband nor his counsel had rebutted in any way the wife's evidence as to her Florida residence. The Massachusetts courts found that the wife was never domiciled in Florida and granted the plaintiff the relief he requested.[4] In reversing, the United States Supreme Court observed that there had been no question but that the proceedings in the Florida court were consistent with the requirements of procedural due process and that the divorce decree was valid and invulnerable to such a collateral attack in Florida. The Court then restated the following rule:

> " . . . the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceeding, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."[5]

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3 334 U.S. 343, 68 S.Ct.1087(1948).

4 320 Mass. 351, 69 N.E. 2d 801 (1946).

5 The basis for this rule is the doctrine of res judicata. See Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3 (1938), where the wife was not permitted to relitigate the issues of jurisdiction after having strongly contested them in the original divorce proceeding brought by the husband. See also American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98 (1932) and Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44 (1939). While these and other cases did not involve divorce, they did establish that the doctrine of res judicata must be applied to questions of jurisdiction in cases arising in State Courts involving the application of the Full Faith and Credit Clause.

In commenting upon the relation of this case to previous decisions, the Court clearly showed the extent of the rule. The *Williams v. North Carolina*[6] cases were distinguished on the basis of the fact that the respective defendants in the Nevada proceedings did not appear or participate. The case of *Andrews v. Andrews*[7] was held to have been superseded insofar as its rule was inconsistent with the rule of *Sherrer v. Sherrer*. In the *Andrews* case, the wife in Massachusetts asserted a right to administer the estate of the deceased husband. The husband had left Massachusetts and obtained a South Dakota divorce. The wife appeared by counsel and filed pleadings challenging the husband's South Dakota domicile. Before the decree of divorce was granted, however, the wife withdrew her appearance with the consent of the husband. The husband remarried in Massachusetts. The Massachusetts Court declared that the South Dakota divorce was invalid because the husband had not established a bona fide domicile in that State.[8] The Supreme Court decided that this was not a violation of the full faith and credit clause and upheld the appointment of the first wife as administratrix. Obviously, such a holding could no longer be asserted in the light of the *Sherrer* case which examined the effect of a defendant's failure to raise the jurisdictional issues after appearance and stated that, "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered."

In *Coe v. Coe*,[9] the companion case of *Sherrer v. Sherrer*, the Supreme Court once again reversed a Massachusetts decision on the ground that it violated the full faith and credit requirements. In that case the wife had obtained a decree for separate support in 1942 in Massachusetts. The husband had answered and filed a libel for divorce which was dismissed. Later the husband left for Nevada where he instituted divorce proceedings. The wife appeared in the Nevada

6 See Footnote 2, supra.
7 188 U.S. 14, 23 Su. Ct. 237 (1903).
8 176 Mass. 92, 57 N.E. 333 (1900).
9 334 U.S. 378, 68 S.Ct. 1094 (1948).

proceedings and filed an answer with a cross-complaint for divorce. In her answer the wife admitted the allegations of the husband as to his Nevada residence, and at the trial she raised no question as to the husband's domicile. The wife was granted a divorce as per her cross-complaint. The husband thereupon married his secretary who had accompanied him to Nevada from Massachusetts. They returned to Massachusetts for some months and then went back to Nevada. The former wife began this action in Massachusetts based upon the decree for separate support granted to her in 1942. The specific relief asked was that the husband be adjudged in contempt of court for failing to abide by the terms of that decree and also that the decree be modified so as to award her a larger allowance. The husband denied that the Massachusetts decree was still in effect and set up the Nevada divorce decree as a bar to the wife's action. The Massachusetts Court permitted the wife to contest the question of jurisdiction of Nevada and declared that the Nevada courts lacked jurisdiction to enter the decree of divorce. In reversing the Massachusetts court, the Supreme Court once again observed that the Nevada decree was valid in Nevada and could not be subjected to a collateral attack there. The Court further observed that the requirements of procedural due process were fulfilled, that the wife was not denied an opportunity to contest the issue of the husband's Nevada domicile, and that the Massachusetts law apparently provided that the support decree would not survive a valid divorce. In substance the Court concluded that the *Sherrer* principle against readjudicating the existence of jurisdictional facts was no less applicable when the party initiating the collateral attack was the one favored by the divorce decree.

In essence then, the *Sherrer* and *Coe* cases finally settled a point left open by the *Williams v. North Carolina* cases. The *Williams* cases decided that the vital concern of a State over the marital status of its citizens cannot be foreclosed by the assertion of another State that it has jurisdiction of that subject matter by reason of the residence or domicile of one of the parties. But now it would appear that where the second spouse appears, at least, all States must recognize the jurisdictional validity of such divorce and apply the doctrine of

res judicata. That this principle will be accepted in full force in New York at least is indicated by the very recent case of *Lynn v. Lynn,*[10] "The force of an adjudication as res judicata does not depend upon whether the case was well or poorly tried, or whether an issue raised was fiercely or only moderately contested, or even upon whether the result reached was right or wrong." The court later stated: "Of course, if there were some fraud or other illegal act which in fact prevented plaintiff from having a fair trial on the question of her husband's Nevada residence, she would have some remedy therefor, *but I think it would be by a direct attack upon the judgment in Nevada and not by an incidental collateral attack here.*" (Italics supplied). In the *Lynn* case, the wife affirmed that she did not contest her husband's residence in the Nevada proceedings in which she appeared because she then believed it to be a bona fide residence. Now the wife asserted that she had since learned that the husband's Nevada residence was "sham and fictitious." The Court found, however, that the wife did deny the husband's allegation of residence, and the jurisdiction of the Nevada court to award a divorce "must now be deemed finally and conclusively settled." (Citing the *Sherrer* and *Coe* cases.) This seems to wrap up the loose ends of the migratory divorce problem when an appearance by the defendant is made. Where divorce proceedings cannot be collaterally attacked in the rendering State, it seems conclusive that a defendant who appeared in such proceedings may not elsewhere attack them. It remains to be seen whether the result will be affected by a question of procedural due process, which the Supreme Court expressly mentioned was not before it in the *Sherrer* and *Coe* cases. It is necessary, however, to mention that there was a strong dissenting opinion to the majority holdings in the *Sherrer* and *Coe* cases. Mr. Justice Frankfurter, with Mr. Justice Murphy concurring, agree with the majority premise that there should be some measure of finality and uniformity as to divorce. But they strongly urge that these ends should not be achieved at the expense of good faith and the sacrificing of the vital interests of those States which are reluctant

10 82 N.Y.S. 2d 397 (1948).

to treat the marriage relation as one to be lightly cast aside. The following quotation seems adequately to embody the purpose of the dissent:

> "The essence of the matter is that through the device of a consent decree, a policy of vital concern to States should not be allowed to be defied with the sanction of this court. If perchance the court leaves open the right of a State to prove fraud in the ordinary sense—namely, that a mock contest was won by prearrangement—the claim falls that today's decision will substantially restrict the area of uncertainty as to the validity of divorces. If the Court seeks to avoid this result by holding that a party to a feigned legal contest cannot question in his home State the good faith behind an adjudication of domicile in another State, such holding is bound to encourage fraud and collusion still further."

The dissent claims that the Full Faith and Credit Clause has never "been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it." By implication at least, the dissent indicates that the majority opinion takes away the force of the *Williams* cases. In a sense this is probably true. As noted before, the majority opinion did expressly distinguish the *Williams* situation from the *Sherrer* situation. But, in no way did the majority indicate or even imply that it intended to overrule the *Williams* cases. The Supreme Court has reaffirmed the *Williams* principle that a collateral attack is possible only upon the question of whether or not the plaintiff established a bona fide domicile within the State rendering the divorce decree.[11] But now even such an attack is not to be permitted when the defendant appeared and the

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11 Prior to the Williams cases, the rule in force was that laid down by the United States Supreme Court in Haddock v. Haddock, 201 U.S. 562, 26 Su.Ct. 525 (1906). There the Court held that the Full Faith and Credit Clause does not compel a State to recognize a foreign divorce decree in rem when the defendant was not actually or constructively subject to the jurisdiction of the rendering State. The Haddock case was expressly overruled by the first Williams case.

doctrine of *res judicata* applies. This principle does not necessitate any change in the New York attitude toward foreign divorces where defendant appeared.[12]

In the second category, that is, cases where the defendant did not appear in the divorce proceedings, the United States Supreme Court has recently reaffirmed the principle laid down in the *Williams* cases. In *Estin* v. *Estin*,[13] that principle was stated to consist of two propositions:

> " . . . (1) that a divorce decree granted by a State to one of its domiciliaries is entitled to full faith and credit in a bigamy prosecution brought in another State, even though the other spouse was given notice of the divorce proceeding only through constructive service; and (2) that while the finding of domicile by the court that granted the decree is entitled to prima facie weight, it is not conclusive in a sister State but might be relitigated there."

This second proposition indicates the treatment that is still to be given in cases of *ex parte* divorces. In the *Estin* case, the husband left his wife in New York and went to Nevada where he obtained a divorce upon constructive service and no appearance by the wife. Prior to the time the husband left New York, the wife had obtained a separation decree awarding her monthly alimony for maintenance and support. The husband paid the alimony until he obtained the Nevada decree. The wife thereafter applied in New York for a supplementary judgment for the amount of the arrears. The husband pleaded the Nevada decree of divorce and moved to eliminate the alimony provisions. Judgment by the Supreme Court of New York was for the wife, but the Court permitted the question of the husband's Nevada domicile to be relitigated, and a finding was made that the husband "is now and since January 1944, has been a bona fide resident of the State of Nevada."[14] In other words, the wife was unable to sustain the burden of overcoming the prima

12 See Glaser v. Glaser, 276 N.Y. 296, 12 N.E. 2d 305 (1938); Ansorge v. Armour, 267 N.Y. 492, 196 N.E. 546 (1935); Guggenheim v. Wahl, 203 N.Y. 390, 96 N.E. 726 (1911); Kinnier v. Kinnier, 45 N.Y. 535 (1871); Tiedeman v. Tiedeman, 172 A.D. 819, 158 N.Y. Supp. 851 (1916); Miller v. Miller, 65 N.Y.S. 2d 696 (1946), affirmed 271 A.D. 974, 67 N.Y.S. 2d 379 (1947).

13 334 U.S. 451, 68 S.Ct. 1213 (1948).

14 63 N.Y.S. 2d 476 (1946).

facie weight of the Nevada finding of domicile. This is the procedure required by the *Williams* cases and, for the time being, is the procedure that each court must follow when an ex parte divorce of a sister State is concerned. The result should be a degree of uniformity totally lacking under the *Haddock* doctrine of comity.[15] Public policy of the individual State is no longer permitted to be the criterion. The only possible basis of divergence from State to State might exist in differing substantive or procedural attitudes as to domicile.

There is another aspect to the *Estin* case which also involves the question of full faith and credit. New York recognized the Nevada decree as valid and as having put an end to the marital relation. At the same time, however, New York held that the Nevada decree did not cut off the wife's property right to alimony under the prior New York decree of separation, by reason of the fact that Nevada did not have *in personam* jurisdiction over the wife. While the general rule was that a valid divorce extinguished an existing judgment of separation, the Court of Appeals announced the rule that not every divorce had such an effect. The Court held that this Nevada divorce did not extinguish the judgment of separation because the wife did not appear in the Nevada proceedings.[16] The United States Supreme Court considered that it was bound by this expression of New York law, "except as it conflicts with the Full Faith and Credit Clause." The Supreme Court concluded that there was no conflict with the Full Faith and Credit Clause because Nevada never had any power to adjudicate the wife's rights in the New York judgment. In the words of the Supreme Court, "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it effects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern." New York's interest, of course is the support of the ex-wife lest she becomes a public charge.

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15 See Footnote 11, supra.

16 296 N.Y. 308, 73 N.E. 2d 113 (1947).

The result reached by the Court of Appeals is somewhat startling, and Mr. Justice Jackson, in his dissent, described it as "Solomon-like." In the first place, the rule is to the contrary in other jurisdictions.[17] In the second place, authority to the contrary seemed to exist in New York prior to the *Estin* case.[18] And in the third place, there still remains the question of whether or not New York gave the Nevada decree full faith and credit or something less than full faith. Clearly this last thought was in Mr. Justice Frankfurter's mind when he dissented. Along with other reasons, Mr. Justice Frankfurter felt that the case should be remanded to the Court of Appeals for clarification as to whether or not New York would hold the same way if the *ex parte* decree had been issued by New York rather than by a sister State.

In the subsequent case of *Lynn v. Lynn*,[19] the New York Supreme Court was confronted with facts similar to those of the *Estin* case, save that the wife contested the Nevada divorce proceeding. Discussing the impact of the *Estin* case, the Court concluded that it could easily be distinguished from the present situation. Here the wife appeared in the Nevada proceeding while in the *Estin* case there was no appearance. Accordingly, it was held that " . . . in view of the divorce, defendant's obligation to support plaintiff has terminated . . ." The limits of the *Estin* case are further pointed up by *Adler v. Adler*.[20] There the wife instituted a proceeding for support in the Domestic Relations Court of the City of New York after the husband had obtained a Nevada divorce decree. The Court found as a fact that the husband had established a bona fide residence within the State of Nevada and that the decree was, therefore, entitled to full faith and credit. The Court dismissed the petition since it was without power to grant such relief to an ex-wife, pointing out in dicta, however, that, even without evidence that she had appeared in the Nevada proceeding, the wife

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17 See as examples, Miller v. Miller, 200 Iowa 1193, 206 N.W. 262 (1925); Esenwein v. Commonwealth of Pennsylvania ex rel Esenwein, 325 U.S. 279, 65 S.Ct. 1118 (1945).

18 Canle v. Canle, 52 N.Y.S. 2d 618 (1944).

19 See Footnote 10, supra.

20 81 N.Y.S. 2d 797 (1948).

could not now receive a judgment for support from any court in the face of a valid divorce terminating the marital status.

It is beyond the scope of this note to treat all the myriad problems connected with the recognition of divorces granted by sister States. An attempt has been made to present the modern approach taken by the courts. The old idea of relitigating the jurisdictional facts has gone by the boards at least when the defendant appeared and had an opportunity to contest them in the initial proceeding. In such a situation, the argument can no longer be sustained that one State with lax laws as to divorce should not be able to contravene the public policy of other States. This was made abundantly clear by the words of the United States Supreme Court in the *Estin* case:

> "The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principle of comity and thus basically altered the status of the States as independent sovereigns. (Citations omitted). It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system which the Constitution designed, demanded it."

Gone too is the old fiction of fault and its effect upon the establishment of separate domiciles.[21] In the recent cases, the Supreme Court permits an examination into domicile on narrow grounds only. Did the persons obtaining the foreign divorce actually set up a domicile in the rendering State so as to give that State jurisdiction over the marital status of its domiciliary? Whether or not the migratory spouse was at fault in causing the breach is of no moment. And whether or not the grounds for divorce would be sufficient in the other State is also immaterial. These two conclusions are substantiated by the fact that the collateral attack brought in New York in the *Estin* case was denied even though the Nevada decree was granted "on the ground of three years

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21 See Haddock v. Haddock, Footnote 11, supra; Dean v. Dean, Footnote 2, supra.

continual separation, without cohabitation" and the prior New York judgment had determined that the husband was at fault.

These recent decisions have not been above criticisms from members of the legal profession. Mr. Ernest G. Lorenzen believes that a solution to the problem cannot be reached so long as the recognition of interstate divorces rests upon the acquisition of a bona fide domicile.[22] Mr. Lorenzen concluded that "In order to recognize migratory divorces, we must abandon all idea that a State has a special interest in the marital relationship of its citizens or persons domiciled in that State. If this can be done, there is no difficulty in holding that under the Full Faith and Credit Clause we simply have to look to the law of the State of divorce." But even this is followed by a warning that the Due Process Clause must be taken into consideration. A less revolutionary criticism is voiced by Mr. Justice Jackson in his dissent to the *Estin* case.

> "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married, and, if so, to whom. Today many people who have simply lived in more than one State do not know, and the most learned lawyer cannot advise them with any confidence. . . . It is therefore important that, whatever we do, we shall not add to the confusion. I think that this decision does just that."

While the majority of the Supreme Court did not agree with Mr. Justice Jackson, there is some indication that the need for even more preciseness in the field of migratory divorces is required. According to a recent newspaper story,[23] the Supreme Court has agreed to hear a case originating in Connecticut and involving a Nevada divorce. Obviously, the more preciseness that exists in this matter, the better it will be for all the people concerned. But it is felt that great strides have been made in reaching some semblance of order and in resolving all the conflicting opinions and interests in-

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22 Lorenzen, The Aftermath of Williams v. North Carolina, 1 Miami Law Quarterly 1 (1947).

23 New York Herald Tribune, Tuesday, October 19, 1948.

volved. Whether or not the results reached are commendable from the sociological viewpoint is not a matter of concern here. It may take many decades before the people and legislatures will agree to a set of uniform laws. Pending such a satisfactory solution, the legal profession will find that the present criteria, while not as definite as could be wished, are more easily applied than before. A.L.M.

JUDICIAL REVIEW OF RATEMAKING IN NEW YORK. Subsequent developments have somewhat carified a recent decision of the New York Court of Appeals, which when it was rendered in May 1947, became the subject of heated controversy among members of the bar.

In *Staten Island Edison Corporation v. Maltbie*,[1] the Court of Appeals, in a four-to-three decision, determined that, upon an allegation that rates fixed by the Public Service Commission are confiscatory and represent an unconstitutional deprivation of its property, a public utility is entitled to a full trial *de novo* on both the law and the facts on the question of valuation of its property. The Court declared that under such circumstances a certiorari proceeding under Article 78 of the Civil Practice Act is an inadequate remedy lacking in due process, and that the New York Supreme Court may entertain an action for an injunction.

The Staten Island Edison Corporation is a New York State corporation doing an intrastate business in the production and sale of electric power. In November 1937, the Public Service Commission on due notice to the utility broadened a pending proceeding to include an investigation into the rates and charges of the utility. Many public hearings were held from 1937 through 1944. The utility appeared, had counsel and fully participated in these hearings. The hearings were extensive, involving 6,786 pages of testimony, hundreds of exhibits, and 178 pages of detailed findings by the Commission.[2] In May 1943, the Commission under applicable law[3] adopted a memorandum directing a temporary reduction in the rates charged by the utility for electric ser-

1 296 N.Y. 374, 73 N.E. 2d 705 (1947).
2 Same case, 57 N.Y.S. 2d 515, 516 (1945).
3 Public Service Law, Sec. 114.

vice supplied to residential, commercial, and industrial consumers.

These rates were temporary and in June 1945 the Commission made a final order declaring permanent the rates as stated in the memorandum of 1943 with slight modifications. The utility did not seek to review the permanent rate order of the Commission by certiorari but brought a plenary action in equity to enjoin the enforcement of the order.

The issue presented squarely to the Court of Appeals was the adequacy or inadequacy of the remedy available to the utility by certiorari to review the rate orders of the Public Service Commission. The utility claimed that as a matter of constitutional right it was entitled to a fair opportunity to submit the issue of confiscation to a judicial tribunal for determination upon its own independent judgment as to both the law and the facts.

Bound by its previous construction of Article 78 of the Civil Practice Act as not permitting review of questions of fact determined on the basis of substantial evidence,[4] and by its interpretation of the U.S. Supreme Court decision in *Ohio Valley Water Co. v. Ben Avon Borough*[5] as requiring that the state must provide adequate opportunity for submitting the confiscation question to a judicial tribunal for independent determination of both the law and the facts, the Court of Appeals simply concluded that the action would lie. "The remedy by certiorari proceedings being thus limited is inadequate in the protection of constitutional right and, in view of the decisions of the Supreme Court of the United States, is lacking in due process. Under these circumstances

4 "The courts may not weigh the evidence or reject the choice made by the Board where the evidence is conflicting and room for choice exists. Matter of Stork Restaurant, Inc., v. Boland, 282 N.Y. 256, 267, 26 N.E. 2d 247, 252 (1940). See also Peo. ex rel Consol. Water Co. v. Maltbie, 275 N.Y. 357, 9 N.E. 2d 961 (1937), appeal dismissed 303 U.S. 158, 58 S.Ct. 506 (1938), and Peo. ex rel N.Y. & Queens Gas Co. v. McCall, 219 N.Y. 84, 113 N.E. 795 (1916), aff'd 245 U.S. 345, 38 S.Ct. 122 (1917).

5 253 U.S. 287, 40 S.Ct. 527 (1919). It is questionable whether the Ben Avon case has not been impliedly overruled, or at least substantially limited. Cf: Railroad Commission v. Oil Co., 310 U.S. 573, 60 S.Ct. 1021 (1939), 311 U.S. 570, 61 S.Ct. 343 (1940); Power Commission v. Pipe Line Co., 315 U.S. 575, 62 S.Ct. 736 (1941); Power Commission v. Hope Gas Co., 320 U.S. 591, 64 S.Ct. 281 (1943); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570, 61 S.Ct. 343 (1940); Tagg Bros. v. United States, 280 U.S. 420, 50 S.Ct. 220 (1929); Nat'l Broadcasting Co., Inc. et al v. United States et al, 319 U.S. 190, 63 S.Ct. 997 (1942).

the Supreme Court of New York as a constitutional court may entertain an action for an injunction, the statutory remedy by certiorari being inadequate."[6]

Practical Aspects

We are not here concerned with the legal merits of the decision itself. They have been extensively criticized elsewhere.[7] It appears, however, that the Court of Appeals has given little consideration not only to the fundamental *raison d'etre* of administrative law but to the practical aspects of the function of rate-making as well.

Long ago the legislature recognized the need of an expert body for the determination of utility rates. No one will deny that the matters considered by the Commission are highly technical, particularly in the light of the recent inter-locking growth of the utility field in general. During the course of its work, the Public Service Commission regulates thousands of utilities operating within the State. The number of its investigations and hearings on the technical processes involved in utility rate regulations are myriad. Through this single decision, whenever confiscation is alleged, the Court of Appeals has now rendered almost nugatory the very purpose for which the Commission itself was created, namely, an expert body for the determination *expeditiously* of the technical problems associated with the rate regulations.[8] As the matter now stands, after the Public Service

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6 Staten Island case, 296 N.Y. 374, 382, 73 N.E. 2d 708, (1947).

7 See R.M. Benjamin, Judicial Review of Administrative Adjudication, 48 Col. L.R. 1 (Jan., 1948); See also W. J. Hickey, Administrative Finality and Due Process of Law, 36 Ga. L.J. 337 (Mar., 1948); 2 Am. Jur. Public Administrative Law, sec. 222.

8 "The public service commissions were created by the legislature . . . to regulate the great public service corporations of the state in the conduct of their business and compel these corporations adequately to discharge their duties to the public and not to exact therefor excessive charges. It was assumed by the legislature that the members of the public service commissions would acquire special knowledge of the matters intrusted to them by experience and study, and that . . . they would prove efficient instrumentalities for dealing with complex problems presented by the activities of the great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control." Peo. ex rel N.Y. & Queens Gas Co. v. McCall, 219 N.Y. 84, 88, 113 N.E. 795, 797 (1916).

Commission has spoken, the case is still open for a further judicial review anew almost as though no proceedings had had been had before the Commission.

The question presented is the quantum of judicial review required to satisfy due process of law. Is it enough for our courts to examine the rate-making commission's findings to see if they were reasonable and supported by substantial evidence or must the courts try out the issues again and make independent findings of law and of fact? There seems to be little doubt but that there must be judicial inquiry along either one of these lines. The Court here seems to have determined that both must be open. If the majority opinion of the Court is construed correctly, it would appear that a utility opposing a proposed reduction of its rate would have a variety of "due process" available to it to circumvent the finality of the Commission's findings with respect to the rate charged for its services.

Suppose, for example, that the Public Service Commission initiates hearings for the determination of the adequacy of a utility's rates. In such a proceeding before the Commission the utility would have its presently available opportunity to contest the evidence offered by the Commission on the question of whether its rates should be reduced or not. Suppose further that the Commission, in its expert judgment, finds that the rates charged by the utility are excessive and orders a reduction of the established rates. Then, in the light of the majority opinion, the utility would have two courses open to it to test the validity of the rates in question. It would, in the first instance, have the existing remedy of a judicial review under Article 78 of the Civil Practice Act. In addition, and this is the additional relief presented to the utility by the *Staten Island* decision, the utility if it alleges confiscation could procure a temporary injunction in an action in equity to restrain the enforcement of the rates established by the Commission pending the independent judicial inquiry as to whether or not the rates fixed were so low as to be confiscatory. In this plenary equity action, the utility could demand a real *de novo* trial on the very issues determined by the Public Service Commission. In such an action, the Special Term would have to weigh for itself the Commission's testimony, receive new evidence if it desired it, and then de-

termine anew the same question decided by the Commission. There is little doubt that an appeal to the Appellate Division would lie from such a determination of a court of equity, and, upon such an appeal, the weight of the evidence would still be open for judicial review. Conceivably, the facts could still be open in the Court of Appeals if the Appellate Division should make new findings of fact. Conceivably, too, each of these fact finders (the Commission, Special Term and the Appellate Division) could reach a different result on the same question. The cumbersomeness of this approach to a purely legislative or administrative problem is obvious.

Procedural Aspects

The procedural aspects of the majority opinion are no less cumbersome. In affording the basis for an equitable action in every rate-making dispute, the majority of the Court said: "We find no compelling necessity for a trial *de novo* of every rate case in which confiscation is claimed. The illegality of such cases is confiscation or deprivation of property without due process of law. The legality of the rate must primarily depend upon the proceedings before the Commission, and the record of those proceedings will of necessity be before the trial court since the statute authorizes determination in the first instance by the Commission and the courts may not properly consider the question without knowledge of the administrative record . . . We need not now consider under what circumstances, if any, the court may be justified in receiving additional proof or newly discovered evidence."[9]

Reading the foregoing quotation of the Court's opinion, it would appear that the equity court could merely make its determination anew on the same evidence which was available before the Commission. To the minority of the Court, at least, this meant "that no new testimony need be taken, and that the equity court may try the issue on the proof already taken by the Commission."[10] Proceedings in the *Staten Island* case, since the decision of the Court of Appeals, however, would seem to indicate that the question of whether

9 296 N.Y. 374, 383, 73 N.E. 2d 704, 708 (1947).
10 Id., at p. 393 or 714.

the equity court need take new testimony is confused and, as one trial justice has already pointed out, "The trial court is left in a field of experimentation and exploration."[11]

The Course Taken By the Commission Since the Staten Island Decision

Following the decision of the Court of Appeals, the Public Service Commission moved in that Court for a clarification of its opinion and sought an explicit statement that new evidence may not be received at Special Term. The Court of Appeals denied that motion and in effect denied the application of the Commission to limit the trial court solely to a consideration of the record before the Public Service Commission.[12] Following these proceedings in the Court of Appeals, the Commission moved at Special Term for summary judgment in the equity action under Rule 113 of the Rules of Civil Practice upon the ground that the answer in the action set forth a prima facie defense of documentary evidence and official record (namely, the record of the proceeding before the Commission). Special Term denied that application and relied completely upon the statement of the court in the *Staten Island* case and the subsequent motion to clarify the court's opinion.[13] It thus appears that the trial court must determine what additional proof, if any, is to be received.[14]

The Practical Application of the Staten Island Decision

The equity action has still not been tried (as of November 15, 1948) although the temporary injunction in that action

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11 Bookstein, J., in Staten Island Edison Corp. v. Maltbie, 191 Misc. 679, 683, 79 N.Y.S. 2d 472, 477 (1948).

12 297 N.Y. 614, 75 N.E. 2d 628 (1947).

13 Staten Island Edison Corp. v. Maltbie, 191 Misc. 679, 79 N.Y.S. 2d 472, (1948); cf., however, County Transportation Co. Inc. v. Maltbie, 189 Misc. 743, 745, 73 N.Y.S. 2d 906 (1948): "This is procedural pioneering; no such motion has been made heretofore in this kind of a case under the New York practice." Right to relief for summary judgment was upheld preliminarily without a determination of the motion on the merits. Later, in 191 Misc. 391, 77 N.Y.S. 2d 746, (1948) the court denied the motion as a matter of discretion.

14 Such was the view of the Appellate Division: "We express no view as to the procedure to be followed at the trial. That problem is for the trial court." Staten Island case, 270 A.D. 55, 59, 58 N.Y.S. 2d 818, 821, (1945).

restraining the enforcement of new rates fixed in 1945 by the Public Service Commission is still in full force and effect. If evidence be needed to sustain the position that the Court of Appeals has finally evolved a cumbersome method of handling administrative problems, here it is. After five years since the initial determination of a rate by the Public Service Commission, the final rate affecting this utility is no nearer effectuation than it was at the time of the preliminary hearing before the Public Service Commission. The hearing *de novo* granted by the Court of Appeals in 1947 has not even commenced. No one can speculate even as to how long such a trial *de novo* could take. Then, under the theory of the Court of Appeals, there would be available an appeal to the Appellate Division from the determination of the equity court and perhaps a later appeal to the Court of Appeals.

Applying these time schedules to the case suggested earlier, it would appear that in the ordinary course of events, the public will have to wait five years at least before any finality can be given to the determination of lower service rates. "Such a hazard is one which neither the community nor the utility companies ought fairly to be called upon to bear."[15]

Under the Staten Island decision the courts of New York State must allow a utility a trial *de novo* until the legislature extends the review of administrative decisions under Article 78 of the Civil Practice Act to include a broader review of orders fixing rates alleged to be confiscatory, or until the Federal courts expressly overrule the *Ben Avon* case. R.Q.D.

THE DEALER'S OPTION CONTRACT; ITS VALIDITY AND ENFORCEABILITY. With the sudden advent of peace after the four-year period that the United States was engaged in World War II, American Industry redirected its attention to producing the goods to satiate the abnormal appetite of a luxury starved public. By and large, the supply and demand factors for the consumer items produced by most industries have slowly returned to what could probably be termed normal; at least a point has been reached where

15 Dickinson, Administrative Justice and the Supremacy of Law, p. 202 (1927).

supply exceeds the immediate demand. The most notable exception to this, however, is the automobile market, where after more than three years of production, there still exists a very definite seller's market. As a consequence, in nearly every city, village or town of the nation there has sprung into existence what has been popularly termed the "new-used car grey market," wherein anomalously, the used car lots are loaded with "slightly used" new cars for sale at exorbitant prices[1] while new car showrooms are bare. The natural reaction to this situation has caused dealer-public relations to ebb to an all time low.

In an effort to combat this grey market,[2] dealers holding manufacturers' franchises for the sale of new cars in many of the States have adopted the practice of requiring prospective purchasers to execute as a contemporaneous condition to the sale of a new car, a contract[3] whereby the purchaser agrees not to sell, exchange or otherwise dispose of the

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1 List price plus five hundred to two thousand dollars depending upon the make and type of vehicle are not at all uncommon.

2 The sincerity of motive will be assumed in the present discussion; however the writer submits for consideration the fact that in many instances there is no appreciable differential between the price of used cars sold by new car dealers as an incident to their new car business and those sold by dealers selling used cars only.

3 The form of contract adopted and approved by the New York Automobile Dealers (an association of new car dealers), and which is illustrative of most agreements of this type contains the following provisions: ". . . Whereas the (purchaser) is desirous of purchasing from the seller a (described automobile), . . . now therefore, in consideration of one dollar in hand paid by the seller and delivery of the aforesaid new automobile by the seller to the purchaser, receipt whereof is hereby acknowledged, and/or other good and valuable considerations, the purchaser hereby covenants and agrees that the above described motor vehicle will not be offered for resale or exchange within ..... days from the date of the excution hereof without written consent of seller. It is further agreed that the purchaser will not sell, exchange, or otherwise dispose of said motor vehicle within ..... days from the date hereof without first giving to the seller the right, privilege and option of purchasing the same for the sum of $.....; and it is further agreed as part of the consideration herein and in order to protect the seller from immediate resale of the said automobile by the purchaser . . . that should the purchaser breach this agreement by selling said automobile before the seller's option hereinbefore given has expired, that he will pay to the seller, the sum of $..... as liquidated damages to be sustained by reason of the breach of this contract by the purchaser . . ."

car within a specified time[4] without first giving the dealer the right to repurchase for a specified sum.[5]

Recent litigation concerning these contracts prompts a brief inquiry into this phase of the law.

Validity of the Contract

Surprisingly enough, there have been few reported cases of attempts by dealers to enforce contracts of this type. In those cases which are reported, however, the defendants (purchasers) generally contend that the contracts are void for failure of consideration and lack of mutuality.

Essentially, the agreements now in use throughout the country fall into two classes as far as consideration is concerned; *viz.*, those which recite only the sale as consideration for the purchaser's promise and those which recite the sale and a separate consideration, ordinarily one dollar.[6] It is in connection with the former that the defense of failure of consideration is generally raised since it would seem that the latter class definitely forecloses such defense. Both types have been attacked as lacking mutuality. An examination of the cases, however, shows that both of these defenses have been universally, if not unanimously rejected by the courts.

In *Burnett v. Schleiger*,[7] an action by plaintiff-dealer against defendant-purchaser for damages for breach of a usual six-month option contract, the defendant attacked the contract as void because not supported by consideration. The Nebraska court, in rejecting defendant's contention and holding the sale alone as sufficient consideration,[8] said of the contract, "It is not a subsequent or collateral undertaking,

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4 Usually six months or one hundred eighty days; however the period may vary in some cases within reasonable limits.

5 The dealer's repurchase price may be stated as a flat sum, e.g. retail price less $150 to $300 depending upon the make and type of car, or may be a percentage figure, e.g. list price less 2 per cent per month for depreciation, or as in at least one case, may be the list price itself.

6 See the New York form of agreement, note 3, supra.

7 Case B 76-240, Municipal Court, Lincoln, Nebraska.

8 See 55 CJ Sec. 69, "Where, however, the option constitutes one of the terms of a sales contract, an independent consideration for the option is not necessary, for if consideration for such contract is sufficient, it will support the subsidiary promise."

but is contemporaneous and an integral part of the contract of sale. . . In such cases the consideration for the contract (sale) itself supports the agreement to repurchase."

In *Schuler v. Dearing Chevrolet Co.*,[9] a six-month option contract, reciting the sale and one dollar as consideration, was attacked by defendant as void for lack of mutuality, indefiniteness and as being unilateral.[10] The court held these contentions as untenable and the contract valid.

In *Benedict Corp. v. Harland Smith*[11] the New York type contract was held valid.

Other cases[12] apparently hold similarly to those above cited, although it is not known whether these same defenses were specifically raised. However, since the courts have granted relief therein, it is assumed that the validity of the contracts in most cases was challenged and passed upon by the courts.

Enforceability

Having determined the validity of these contracts, it now becomes necessary to ascertain whether they are enforceable, *i.e.*, what is the type and measure of plaintiff's relief, if any? Has the dealer actually suffered any damage upon the breach of an option contract? In those contracts where provisions are made for liquidated damages, will the courts give effect thereto? Suppose there is no liquidated damage clause, may the dealer sue for specific performance? What are the rights of third persons who purchase with and without notice from the original vendee? It will be apparent that categorical answers to these questions are impossible and that rather each must be answered in accordance with the facts peculiar to it.

When the dealer's repurchase agreement was originally conceived as a means to combat the grey market, it generally did not provide for liquidated damages. Hence, when actions for breach thereof were brought, it became incumbent upon

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9 Ga. , 46 S.E. 2d 611 (1948).

10 See 46 Am. Jur. Sec. 509, ". . . the fact that the repurchase agreement is obligatory on one of the parties and optional with the other, does not invalidate it for want of mutuality." (citing Ann Cas 1918D 744, 745).

11 N.Y. Supreme Court, unreported at this writing. See the New York State Journal (Albany, N.Y.) Oct. 11, 1948.

12 See cases discussed in connection with "Enforceability" infra.

the plaintiff dealers to prove actual damages. In some cases this has caused considerable embarassment because the dealer has been forced to sue for the difference between the stipulated repurchase price and the market price, which is generally considerably greater than list price; yet the dealer is bound by the terms of his franchise not to sell the car at a price greater than list. This situation arose in the *Schuler* case, where the dealer's option price was the same as the retail price. Upon defendant's breach, plaintiff in an action for damages alleged that he could have resold the car at a much higher price but that since he was an authorized dealer, he would not have resold the car above the list price set by the manufacturer. The court though holding the contract valid further held that from the admission contained in his pleadings it was apparent that plaintiff had suffered no damage and accordingly denied relief. It may be inferred from the language of the opinion, however, that relief would have been granted if the repurchase price had been anything less than the retail price.

In other cases, dealers who have not been overly generous in their admissions have fared better. The dealer-plaintiff in *Benedict Corp. v. Harland Smith*[13] for example, sought only twenty-five dollars nominal damages for breach of an option contract (no liquidation damage provision). Supreme Court Justice Coon ruled the contract valid, and in his charge to the jury said that the only question to be determined by them was whether plaintiff had been damaged.

Again in *Al Roger Inc. v. DeCoteau*,[14] an action involving a contract wherein the repurchase price was specified as list price less 10 per cent, plaintiff sought as damages 10 per cent of the total price (list plus accessories). The court held that plaintiff was entitled to recover only 10 per cent of the list price. It will be noted that the recovery here is actually the difference between the repurchase price and list price which would seem to be in accord with the inference drawn from the *Schuler* case.

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13 Supra, Footnote 11.

14 Detroit, Mich., unreported.

Other unreported cases in point are *Bartell Motor Co. v. Hruby* (Cicero, Ill.) and *Mueller-Harkins Motor Co. v. Page* (Wash.). In the former, defendant had resold the car at a profit of $400. It is not known just what relief plaintiff sought, but the court awarded damages in the amount of $200 to plaintiff. In the latter case, very little is known of the facts, but plaintiff was awarded $400 damages plus $200 court costs.

The question of whether courts may decree specific performance of dealer-option contracts embodies many considerations. Since none of the cases discussed involves a request for specific performance we may only theorize as to what a court would do when and if the question is presented. Primarily, it is to be noted that this type of relief may be sought only in connection with those contracts not containing liquidated damage clauses; otherwise courts would be forced to leave the plaintiff to his remedy at law. In determining whether plaintiff has an adequate remedy at law, a court as an incident thereto would be required to find whether or not new automobiles are unique chattels or otherwise so unusual as to justify the relief. It is conceivable that a court could take notice of the general economic situation in relation to the new car market and thus overcome this barrier. Finally, the rights of third persons must be considered since the question would not arise until breach, which in nearly all cases is effected by way of sale to third person purchasers from the original vendee. It is doubted that this would pose much of a problem since courts would in all probability apply the well known notice rule holding purchasers with notice bound by the terms of the contract and bona fide purchasers without notice not bound.

A case relating to the general question, though not exactly in point, is that of *Larson Buick Co., Inc. v. Mosca et al.*[15] Here plaintiff applied for a temporary injunction restraining the transfer of an automobile sold by plaintiff to defendant Mosca upon the latter's representation that "he was purchasing the vehicle for himself with no intention of transferring the same to a used car dealer." On the following day,

15 79 N.Y.S. 2d 654.

Mosca, in breach of a six-month option contract signed by him, resold the car to defendant Joni Lynn, Inc. (a used car dealer), an officer of which was present at the time of the original sale to Mosca. In granting the temporary injunction, the court said:

> "An honest dealer should be encouraged by the court (1) in his efforts to transfer his allotted quota of automobiles to bona fide individual purchasers, (2) in his attempt to comply with his agency contract, which bars a dealer from selling new cars to used car dealers, and (3) in rescinding a transaction conceived in fraud.
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> "An action for damages would not, under the circumstances of this case, be an adequate remedy."[16]

Unfortunately, we may only assume how the court would finally have disposed of the case since it is understood that immediately after the temporary injunction was granted, the car was returned to the plaintiff without further action. From the quoted language of the opinion, however, it may reasonably be inferred that the court in such a situation would not be averse to decreeing specific performance, or granting a mandatory final injunction, as the case may be.

The more modern forms of contract nearly all contain clauses liquidating damages upon breach. Generally speaking, the courts have found little difficulty in granting such relief, thus overruling the usual contention of defendants in such cases, namely, that the liquidated damage provision amounts to nothing more than a penalty. It should be noted, however, that where such a contention is made, plaintiff apparently has the burden of showing that his actual damage is equal to or greater than the liquidated damage.[17] An example of this is to be found in *Burnett v. Schleiger*.[18] There damages were liquidated at three hundred dollars and defendant attacked the provision as a penalty and hence unen-

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16 It is interesting to note that prior to the Larson case, the form of contract approved by the New York State Automobile Dealers contained no provision for liquidated damages. Immediately thereafter, the form was modified to include such provision.

17 There can be no doubt that relief would have been denied in Schuler v. Dearing Chevrolet Co., even if the contract there had made provision for liquidated damages.

18 Supra, Footnote 7.

forceable. The argument was summarily dismissed by a showing that plaintiff's actual damage was $557 and that therefore " . . . the $300 fixed as liquidated damages is not only reasonable but actually less than plaintiff's damages as shown." It would seem then, that in any case where plaintiff's actual damage is less than the liquidated damages, any recovery should be limited to the former.

Conclusions

From the foregoing, it may be seen that a line of precedent is gradually evolving which seems to indicate the willingness of the courts to aid the sincere new car dealer in his attempt to counteract and combat the new-used car grey market. The validity of dealer's option contracts has been upheld unanimously, and with but few exceptions, appropriate remedies have been granted.

F.X.W., Jr.

Recent Cases

AGENCY — ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT — GOING TO OR FROM MEALS — Plaintiff was employed from 9:00 A.M. to 12:00 Noon, and from 1:00 P.M. to 6:00 P.M., and was instructed by the manager during working hours to hurry home to eat supper so that she could hurry back for the purpose of taking a stock inventory. Upon arriving home, she accidentally stubbed her toe and missed a step going into the house, sustaining injuries. *Held,* that such injuries arose out of and in the course of employment: *Ross v. Sunrise Food Exchange et al,* 273 A.D. 833, 75 N.Y.S. 2d 897. (1948).

In so deciding, the Court followed the general rule in New York. In *Matter of Bollard v. Engel,* 254 A.D. 162, 4 N.Y.S. 2d 363 (1938) aff'd 278 N.Y. 463, 17 N.E. 2d 130 (1938), the deceased was an automobile salesman who had no regular hours of employment and who was fatally injured by an automobile while returning to work from supper. The Court stated that the words, arising out of and in the course of employment, should be given a broad and liberal construction in conformity with the humanitarian purpose of the statute for Workmen's Compensation. "It is true that the lunch hour is part of the time which the employee devotes to a purpose ancillary to his work. In order that a workman may continue to render service it is essential that he should eat . . . It would be taking too technical a view of the law to say that a pause in the actual course of his work by an employee for the purpose of eating is a break in his actual course of his employment from the time he stops work to the time when he begins again. We must take a broader view and treat the employee as continuing in the employment." Same case, at pp. 164-5.

In the Matter of the Claim of George S. Layton, Sr., 261 A.D. 856, 24 N.Y.S. 2d 793 (1941), aff'd 287 N.Y. 610, 39 N.E. 2d 259 (1941), claimant was employed as a retail furniture salesman on commission, and according to custom and permission, he walked one block to a tavern for some lunch.

While returning to the store, he slipped on some ice and fell. The State Industrial Board found that the accident arose out of and in the course of his employment, but the award was reversed in the Appellate Division on the authority of *Matter of Johnson v. Smith*, 263 N.Y. 10, 188 N.E. 140 (1933) and *Matter of Oram v. Byron G. Moon Co., Inc.*, 260 A.D. 822, 22 N.Y.S. 2d 355 (1940). Two judges dissented on the authority of *Bollard v. Engel*, above. The same Third Department which has decided all of the cases discussed in this article, held in *Lovett v. Buck*, 260 A.D. 824, 22 N.Y.S. 2d 399 (1940) that the Industrial Board was correct in holding that a night man in a garage was in the course of his employment when he was injured while driving on his way to obtain some coffee.

In 1947, the only other case in point was again decided by the Third Department. This case, *In the Matter of the Claim of Paul Rucker*, 272 A.D. 982, 73 N.Y.S. 2d 275, held that an elevator operator, who was injured when he slipped in the street while returning to his place of employment during a 20-minute "relief period," can not be said to have been so separated from his employment that his accident did not arise out of and during the course thereof. The authority cited for this, was *Matter of Bollard v. Engel* above, which now seems to be firmly established as the law.

CONTRACTS — WAR INSURANCE — COUNTRY ENGAGED IN WAR. Deceased was insured for $5,234.00, conditioned in that the amount payable should be a said restricted amount as defined in the policy, if the death of insured should occur "outside the home areas while the insured is in the military or naval forces of any country engaged in war . . . war included undeclared war." The insured died outside the home areas while in the military forces of the United States on Sept. 25, 1945, from a wholly non-military cause. *Held*, that deceased was not in the military forces of a country engaged in war, at the time of his death: *New York Life Ins. Co. v. Durham*, 166 F 2d 874. (1948).

The court here agreed with the general rule that the existence and restoration of peace are determined solely by political departments of government and such determinations are

conclusively binding on courts in all matters of state or public concern, and this though the actual facts of warefare may be different. The principle case was distinguished in that in all private matters, unaffected by public interest, "The parties are undoubtedly free to contract with reference to war and to give it such definition, connotation and meaning, as does not infringe upon public policy."

It was thus explained that courts must construe a term according to the manifest intent of the parties, so that the political determination of the duration of war was immaterial, if the parties clearly intended war to have a different meaning. By including undeclared war, it was felt that they chose not to use the word in its technical or formal sense, but rather in the practical and realistic sense in which it is commonly used and understood, especially with regard to the hazards of human life. Thus after the surrender of our enemies, the insured was not in the service of a "country engaged in war" as those words were used to measure coverage in the insurance contract.

On almost the same set of facts a similar result was reached in *Stinson v. New York Life Ins. Co.*, 167 F. 2d 233, 69 F. Supp. 860 (1948), decided only 11 days after the principle case. In the *Stinson* case, however, the Court employed a slightly different approach, declaring that a phrase in a contract would be given the meaning which common speech imports, where the terms of a life policy were devised by the insurer and the contract was presented in fixed form, and the insurer failed to make it obvious that a technical meaning was intended. The words, "engaged in war" in common speech were then held to mean actual warfare, terminated by capitulation of enemy forces.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — STATE ACTION WITHIN THE FOURTEENTH AMENDMENT — RESTRICTIVE COVENANTS IN DEEDS. In two decisions treating restrictive covenants the United States Supreme Court recently held that state court enforcement of such covenants excluding racial minorities is unconstitutional state action within the meaning of the "equal protection of the law" clause of the Fourteenth Amendment, and that enforcement thereof

in federal territory to the prejudice of Negroes is violative of Section 1978 of the Revised Statutes as derived from the United States Civil Rights Act of 1866, insuring all citizens equal rights to acquire and dispose of real and personal property. Whether enforcement of such covenants is repugnant to the Fifth Amendment the Court refused to say.

In *Shelly v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836 (1948), the petitioners, Negroes, purchased in St. Louis, Missouri, residential property subject to prior covenants restricting its conveyance to white grantees. Respondents, as owners of other property subject to the terms of the restrictive covenants, brought suit praying that petitioners be restrained from taking possession of the property and that judgment be entered divesting title from petitioners and revesting it in the grantors.

Hurd v. Dodge, 334 U.S. 24, 68 S.Ct. 847 (1948), arose under a similar state of facts in the District of Columbia, where the District Court granted an injunction which was sustained by the Court of Appeals.

Despite the great importance of the question whether racial restrictive covenants are valid and enforceable by injunction, the Supreme Court has never before ruled on the matter. The few state courts that have passed on the problem are divided. See 33 Cal. Law Rev. 5 (1945).

Corrigan v. Buckley, 271 U.S. 323, 26 S.Ct. 521 (1926) was previously the outstanding decision of our highest court on the constitutional status of restrictive covenants. That case arose in the District of Columbia where the District Court granted an injunction which was upheld by the Court of Appeals. The defendant then sought review by the Supreme Court on the theory that the injunction enforcing the covenant and not the covenant itself denied the defendant either due process or the equal protection of the laws. The Court, however, avoided the specific issue in its decision, deciding merely that the prohibitions of the Fourteenth Amendment apply to state actions exclusively and not to any actions of private individuals. Nevertheless, the *Corrigan Case* has been cited generally as having decided any Constitutional questions relating to the enforceability of restrictive covenants by the courts. *Mead v. Dennistone,* 173 Md 295,

196 A 330 (1928); *Mays v. Burgess,* 79 App. D.C. 343 (1945). The case of *Sipes v. McGhee,* 316 Mich. 314, 25 N.W. 2d 638 (1947), although upholding the injunction granted by the lower court, recognized, apparently for the first time, that the *Corrigan* decision was not conclusive authority on this question.

The Supreme Court, in the *Shelley* case, declared that restrictive covenants standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment, and, as long as the purpose of these agreements is effectuated by voluntary adherance to their terms, the state has not "acted" in support thereof. However, here there was an added element. The purposes of the agreements were secured by judicial enforcement by state courts of the restrictive terms of the agreements. In rejecting the respondents' argument that judicial enforcement of private agreements does not amount to state action, or that in any event the participation of the state in any discrimination is so remade in character as not to amount to state action within the meaning of the Fourteenth Amendment, the Court went beyond the scope of prior decisions.

"It is doubtless true that a state may act through different agencies—either by its legislative, its executive, or its judicial authorities." *Virgina v. Rives,* 100 U.S. 313, 25 L.Ed. 667 (1879). The Fourteenth Amendment makes void state action of any kind inconsistent with the guarantees therein contained. *Civil Rights Cases* 109 U.S. 3, 3 S.Ct. 18 (1883). In *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14 (1908), the Court held that the defendant had been deprived of due process of law by an instruction to the jury permitting it to draw a prejudicial conclusion from his failure to testify and stated that: "The judicial act of the highest court, in authoritatively construing and enforcing its laws is the act of the state." Clearly the state court holdings in *Ex Parte Virginia,* 100 U.S. 339, 25 L.Ed. 676 (1879), where the judge of a state court excluded a colored citizen from the jury list, and *Moore v. Dempsey,* 261 U.S. 86, 43 S. Ct. 265 (1923), where the defendant was denied due process by a state court under the domination of a mob, were considered to be state action.

In all these cases what the court did or failed to do was the essence of the offending conduct. In the *Shelley* case, however, the Court is not utilizing any power of the state to discriminate but, rather, is enforcing the contract of private individuals. Of course, the individual's act of discrimination, the covenant, would be ineffective without the court's cooperation. But this is likewise true in cases upholding an individual landowner's privilege, even in the absence of restrictive covenants, to refuse to sell to a Negro. The logic of those who attribute to the state the discrimination effected by racial restrictive covenants would require them to argue that, in protecting the property rights of one who refused to sell to a Negro, the state was denying to a Negro the equal protection of the laws. Attempts to distinguish prior cases on this ground, however, were swept away by the holding that state action "refers to exertions of state power in all forms." With this obstacle surmounted, the Court concluded that coercive court action, based solely on racial grounds, denied to a willing buyer the enjoyment of property rights which were enjoyed as a matter of course by other citizens of different race or color—a clear denial of equal protection of the laws.

The *Hurd* case presented the problem from another angle, for the property was located in, and the rupture of the restrictive covenant was enjoined by a federal district court of, the District of Columbia, and the Supreme Court was unable to utilize the equal protection of laws clause found in the Fourteenth Amendment. Petitioners contended that such action is governmental action prohibited by the due process clause of the Fifth Amendment. After full consideration the Court found it unnecessary to resolve the constitutional issue and based its decision on Section 1978 of the Revised statutes, derived from Section 1 of the Civil Rights Act of 1866, which provides:

> All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property. (8 U.S.C.A. 42).

The Court held that to suggest that the Negro petitioners have been accorded the same rights as white citizens is to re-

ject the plain meaning of the language of the Revised Statutes. And, further, the Court decided that the action of the federal court was of such a nature that if taken by the state courts it would violate the prohibitory provisions of the Fourteenth Amendment (citing *Shelley v. Kraemer, supra*), and that it was not consistent with the public policy of the United States to permit federal courts to exercise general equitable powers when the exercise of similar equitable powers by the state courts has been held to be violative of the equal protection of the laws.

There now seems to be just one further question remaining. Does the Supreme Court really incline toward the position that the restrictive covenants when enforced are violative of the equal protection clause, or are they invalid *per se*? It is probable that these decisions will give rise to actions for damages for breach of covenant. If so, the above question must of necessity be decided, for then the cause of action will not involve issues of equal protection of the laws or discrimination, but will present squarely to the Court the question of the inherent validity of the covenant itself.

PERSONAL JURISDICTION — NON-RESIDENT DEFENDANT — DOING BUSINESS IN NEW YORK— MANAGING AGENT. Defendant Texas corporation's sales were made in New York by Sopic Trading Co., an independent partnership which, as manufacturer's agents, leased a showroom, had two salesmen, and promoted and solicited sales in New York, obtaining thereby nine per cent of defendant's gross sales. The partners received a commission, and paid all their own expenses. All orders were subject to written approval and acceptance in Texas. *Held*, that the defendant corporation was present in New York and that service made on the partnership was valid service on a managing agent of defendant corporation. *Bomze v. Nardis Sportswear, Inc.*, 165 F. 2d 33 (2nd Circuit, 1948).

New York activities insufficient to constitute doing business within the meaning of General Corporation Law §15 may well be sufficient to constitute presence so as to render a corporation amenable to process. *International Text Book Co. v. Tone*, 220 N.Y. 313, 115 N.E. 914 (1917). The cause of action need not have arisen out of such activities. *Bagdon*

v. Philadelphia & Reading Coal & Iron Co., 217 N.Y. 432, 111 N.E. 1075 (1916); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

No attempt has been made by the courts to define exactly what local activities are sufficient. " . . . There is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here (citing cases). If it is here it may be served." Cardozo, J., in *Tauza v. Susquehanna Coal Co., supra,* at p. 268. The New York courts have consistently followed this test. *Chaplin v. Selznick,* 293 N.Y. 529, 58 N.E. 2d 719 (1944), citing numerous examples.

The courts have varied widely in the application of Judge Cardozo's words. [eg., *Holzer v. Dodge Brothers,* 233 N.Y. 216, 135 N.E. 268 (1922); *Lillibridge, Inc. v. Johnson Bronze Co.*, 247 N.Y. 548, 161 N.E. 177 (1928); *Gaboury v. Central Vermont Ry. Co.*, 250 N.Y. 233, 165 N.E. 275 (1929); *Yeckes-Eichenbaum, Inc., v. McCarthy,* 290 N.Y. 437, 49 N.E. 2d 517 (1943).] The significance of the instant decision, however, is that, like *Melvin Pine & Co. v. McConnell et al,* 273 A.D. 218, 76 N.Y.S. 2d 279, (1948), it represents a swing of the pendulum back to a more liberal application of the "test."

The *Pine & Co.* case arose under Section 229b of the Civil Practice Act, applying to service of process on a non-resident natural person engaged in business in New York. The test, however, is the same as that used in determining whether a foreign corporation is present and subject to process. *Yeckes-Eichenbaum v. McCarthy, supra; Debney v. Hanna,* 182 Misc. 824, 45 N.Y.S. 2d 551 (1944). In *Pine & Co.,* the facts were similar to those of the instant case save that the defendants' New York sales were solicited by, and service made upon, a New York corporation which acted as representative for a number of manufacturers, including defendants. Another corporation handled export business for the defendants in New York, and in addition various minor activities were engaged in. Taking into account the "cumulative significance of all the activities conducted in this jurisdiction," the court there held that the defendants were subject to process here and that service was valid.

Liberal application of the "test" was long restricted in New York. Where a foreign corporation manufacturing automobiles granted sales franchises to New York dealers, maintained an office in New York under a district manager having the title of "General Sales Manager," and maintained a New York office to handle its export business, it was not "present." *Holzer v. Dodge Brothers, supra.* Nothing short of a "substantial part of its main business" equaled presence of a corporation in New York. Same case. It seems clear that a considerable advance from this language is reflected in the instant decision as well as in that of the *Pine* & *Co.* case.

It remains to be seen, moreover, what will be the effect of the "cumulative significance" doctrine of the latter case. Although inherent in the accepted test, the express use of the phrase will undoubtedly take much of the force from the numerous decisions holding various independent activities insufficient to constitute doing business here. *Lauricella v. Evening News Publishing Co.,* 15 F. Supp. 671 (E.D.N.Y., 1936—maintaining staff of advertising solicitors in New York); *Greenberg v. Lamson Brothers Co.,* 273 A.D. 57, 75 N. Y. S. 2d 233, (First Dept., 1947—sending large staff of buyers to New York, and engaging local agency as resident buyer here); *Krakowski v. White Sulphur Springs, Inc.,* 174 A.D. 440, 161 N.Y.S. 193 (First Dept., 1916—advertising defendant's business here); *Brocia v. Franklin Plan Corp.,* 235 A.D. 421, 257 N.Y. Supp. 167 (Fourth Dept., 1932, research work and training employees); *Yeckes-Eichenbaum, Inc. v. McCarthy et al, supra* (maintenance of office for solicitation of railroad freight and passengers on lines outside New York—no tickets sold or bills of lading issued); *Fowble v. C. & O. Ry. Co.,* 16 F. 2d 504 (S.D.N.Y., 1926—same plus New York bank accounts and maintenance of transfer agent in New York).

In arriving at its conclusion that the defendant, Nardis Sportswear, Inc., was doing business in New York so as to make it amenable to process, the court noted but did not rely on the doctrine of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 Sup.Ct. 154 (1945) to the effect that the balance of conveniences is a relevant test in deciding whether the non-resident corporation should be required to

defend within the state into which its activities have carried it. "If the state courts . . . regard the inquiry, how far they may go, as coalesced with the inquiry, how far they will go, *International Shoe Co. v. Washington,* has effected a change." *Bomze* case, at p. 35. The court decided, however, that until the New York courts act, it would consider only the announced New York decisions.

The New York Court of Appeals has so far found it unnecessary to consider whether it will avail itself of the door opened by the *International Shoe Co.* case. *Pine & Co. v. McConnell, supra.* That it may do so, however, is clear. Same case. "The problem is not one of statutory construction. It is one of jurisdiction, of private international law." Cardozo, J., in *Tauza v. Susquehanna Coal Co., supra.* The ultimate test is whether the non-resident corporation has established sufficient ties and contacts with the state as to make it reasonable and just according to traditional concepts of fair play and substantial justice to make it account in the state for its obligations. *International Shoe Co. v. Washington, supra.*

The court in the *Bomze* case found little difficulty with the question as to whether service was made on a managing agent of the defendant. It interpreted the New York rule to be that wherever the corporation is found to be doing business in the state, "The agent in charge of those activities is the 'managing agent' pro hac vice." *Bomze* case, at p. 37.

Such a result is not inevitably suggested by the decisions of the New York courts. A managing agent within the meaning of Section 229 of the Civil Practice Act must be some one vested by the corporation with "general powers involving the exercise of judgment and discretion." *Taylor v. Granite State Provident Association,* 136 N.Y. 343, 346, 32 N.E. 992 (1893). See also *Yeckes-Eichenbaum v. McCarthy, supra.* That he merely assumed to act as agent is not sufficient, *Loeb v. Star & Herald Co., Inc.,* 187 A.D. 175, 175 N.Y. Supp. 412 (First Dept., 1919). That he is a representative of a foreign corporation for some purpose does not mean he is a managing agent. *Coler v. Pittsburg Bridge Co.,* 146 N.Y. 281, 40 N.E. 779 (1895); *Fontana v. Post Printing and Publishing Co.,* 87 A.D. 233, 84 N.Y. Supp. 308 (First Dept., 1903).

However, inasmuch as the object of the service is reached where the agent is of sufficient importance to make it reasonably certain that the defendant will be apprised thereof, the statute is satisfied if he is a managing agent to any extent, so long as he has discretionary powers. *Brown v. U.S. Daily Publishing Corp.*, 146 Misc. 539, 262 N.Y. Supp. 551 (1933) *aff'd* 239 A.D. 777, 263 N.Y. Supp. 943 (1933). He need not have express authority to accept service. *Tauza v. Susquehanna Coal, supra.*

None of the cases dispensed with the requirement that the managing agent have some degree of discretionary power. To the extent that they are understood to alter this rule, the words of the *Bomze* decision must be suspect. That they do intend to alter it, however, is not abundantly clear. It is understandably difficult to imagine a situation in which the person in charge of domestic activities of a corporation found to be doing business in New York does not have the required discretionary powers. Until the New York courts follow the avenue opened by *International Shoe Co. v. Washington, supra,* and greatly expand the concept of corporate presence, the questions remains moot.

UNLAWFUL PRACTICE OF LAW—ACCOUNTANT RENDERING LEGAL ADVICE — PROSECUTION BY ATTORNEY GENERAL — CONTEMPT OF COURT. The Croft Company had consulted its regular accountant, who was also a lawyer, concerning the possibility of deducting the amount of certain sales and use taxes levied by the City of New York for business done in the years 1936, 1937, and 1938 as an expense incurred in the year 1943 in the computation of its federal income tax. The regular accountant had given his opinion, based on a decision of the United States Supreme Court, that any such payment would have to be charged back to the years in which the tax obligations were incurred. The president of the Croft Company then consulted respondent, an accountant, who was not an employee of the Croft Company, and had nothing to do with Croft's books or the preparation of the tax return. Respondent stated that he believed that the situation of the Croft Company was an exception to the general rule, that there was a decision, somewhere, in the company's favor. After

research, respondent found an Internal Revenue Department ruling on precisely the point in question which ruled in the company's favor. This type of service was not an isolated instance in respondent's practice; he often gave advice of this character without examining books of preparing tax returns. Proceedings were thereafter brought directly by the New York County Lawyer's Association without prior application to the Attorney General. *Held:* that respondent was in contempt of court; his activities constituted the unauthorized practice of law; he was enjoined from further pursuit thereof. *In Re Bercu,* 273 A.D. 524; 78 N.Y.S. 2d, 209 (1948).

In so ruling, the Appellate Court necessarily decided on three points: First—That respondent was, in fact, engaged in the practice of law; Second—That Subsection 7 of Section 750 of the Judiciary Law applied to instances of forbidden conduct occurring outside the immediate presence of the court; Third—That the court had the power to enjoin despite the Bar Association's failure to comply with Article 75a of the Civil Practice Act requiring an unsuccessful request to the Attorney General to prosecute the action before maintaining it in its own name.

The Appellate Division admitted that the case was a difficult one. The fields of laws and accounting overlap and there is necessarily a common ground—since an accountant must know the tax law and a tax lawyer must know accounting. Nevertheless, it was felt that a line of demarcation must exist, since none but a duly admitted attorney may practice law. And though a layman may know more about the law of his specialty than a lawyer engaged in general practice, he may not set himself up as a consultant on the law of his specialty; the public must still turn to the bar when the services of a legal specialist are required. There is no intent or desire to oust the accountant from the field of tax returns. The accountant should be allowed jurisdiction of incidental questions of law which may arise in connection with auditing books or preparing tax returns. It is possible that precisely the same question may at one time arise during the preparation of an income tax return and at another time serve as the subject of a request for advice to a client. The

difference is that in the one case the accountant is dealing with a question of law which is only incidental to the preparation of a tax return and in the other case he is addressing himself to a question of law alone. An accountant is denied the right, as a consultant, to give legal advice. In this case, since respondent had nothing to do with the books and accounts, and had only to determine the view "the tax authorities and ultimately the courts" would take concerning the established facts, he had given legal advice unconnected with accounting work.

It has long been the rule that the practice of law is not confined to the courtroom. *Peo. v. Alfani,* 227 N.Y. 334, 125 N.E. 67, (1919). But it is difficult to predict exactly which out-of-court activities will be considered legitimate business practices and which will fall under the heading of practicing law. The formation of any comprehensive definition of what constitutes the practice of law that could satisfactorily be applied to all situations is impractical, if not impossible. *Re Standard Tax & Management Corp.,* 181 Misc. 632, 43 N.Y.S. 2d 479, (1943). It has been stated that "Any person who renders an opinion as to the proper interpretation of a statute, or gives information as to what judicial or quasi-judicial tribunals are deciding and receives pay for it is practicing law." *Mandelbaum v. Gilbert & Barker Mfg. Co.,* 160 Misc. 656, 290 N.Y. Supp. 462, (1936). But while this is a comprehensive, general statement, the courts have not adapted it in its strict sense; had they done so, there probably would have been little question that respondent fell within its definition. It seems that no exact boundary can be staked out, and the most exact statement that can be made is that each case must be decided on its own merits as it arises. *Re Standard Tax & Management Corp., supra.*

Although the exact line of demarcation between law and other fields cannot be defined, there is a distinct and noticeable tendency to restrict the fields dealing with legal questions in which lay agencies may operate. 5 Am. Jur., Attorney at Law, Sect. 3; 111 A.L.R. 24. For instance, in 1937, it was held that an agent appearing regularly in summary proceedings to recover real property, where Section 1414 of the Civil Practice Act authorizes a landlord to appear by an agent, was not practicing law. *10th St. & 5th Ave. Inc. v.*

Naughton, 163 Misc. 437, 296 N.Y.S. 952, (1937). The court even refused to recognize the distinction drawn several weeks earlier between a natural person landlord and a corporate landlord in *Finox Realty v. Lippman,* 163 Misc. 870, 296 N.Y. Supp. 945, (1937), ruling that since a natural person may appear regularly by agent, so may a corporation. But in 1946, it was stated unequivocally: "Respondent admits that for many years he has made a regular practice of handling dispossess proceedings for landlords. I entertain no doubt that that constitutes the practice of law." *In re Wenger,* 186 Misc. 966, 61 N.Y. Supp. 2d, 686 (1946). Thus, it would seem that that which was considered a legitimate activity of real estate agents in 1937 is today permissable only in isolated instances not amounting to a "regular practice."

Although there are very few adjudicated cases with facts similar to those in the Bercu case, the courts of Massachusetts, at least, would undoubtedly agree with the result reached therein. In 1935, it was observed that although the work of an accountant disassociated from legal advice does not constitute the practice of law, the giving of advice in making tax returns lies close to the boundary and may easily become or be accompanied by the practice of law. *Re Opinion of Justices,* 289 Mass. 607, (1935). And in 1943, the Massachusetts court, while expressly refusing to decide whether answering legal questions incidental and necessary to the completion of tax returns was the practice of law, stated that the examination of statutes, judicial decisions and departmental rulings, for the purpose of advising a client upon a question of law relative to taxation, and the rendering to a client of an opinion thereon, are a practice of the law in which only members of the bar may engage. *Lowell Bar Ass'n v. Loeb,* 315 Mass. 176, 52 N.E. 2d 27 (1943).

There have been relatively few decisions concerning the scope or application of Judiciary Law Section 750 Subsection 7, which gives the courts summary jurisdiction to punish for a contempt those persons who engage in the practice of law without authority. It was held by a lower court in 1939, two years after passage of the section, that the power of the court to punish for a contempt granted by the

statute could be invoked only when the acts complained of were committed within the direct involvement of the court. *In re Lehman*, 256 A.D. 677, 11 N.Y.S. 2d 429. The refusal of the Court of Appeals, in a 1945 memorandum decision, to dismiss a complaint against an individual for activities alleged to be out-of-court practice of law has been generally quoted as authority for the proposition that the court may punish for contempt, under this statute, for practices of law not occurring in the presence of the court. *Application of N.Y. County Lawyer's Ass'n*, 294 N.Y. 853, 62 N.E. 2d, 398. The *Bercu* case, however, marks the first instance in which an appellate court has unconditionally, in express words, interpreted this statute in this manner.

This decision would seem to make compliance with Article 75a of the Civil Practice Act an unnecessary formality, at least, in a case where the commission of the act alleged is not contested and the court is required only to classify the act as lawful or unlawful. The Bar Association is not a proper party to sue directly for an injunction. But where the court obtains jurisdiction under Judiciary Law, Section 750, Subsection 7 (and a bar association may directly commence proceedings under that section), Article 75a does not tend to limit the court's power in regard to the remedies it may decree. The limitation is upon the bar association, only, as to the type of action it may commence; it has no connection with the power of the court to make a decree in another type of action. The fact that the bar association had requested an injunction was incidental and immaterial. Since the court was authorized by the section of the Judiciary Law to punish for contempt in such a situation, it could also, as an incident to the inherent power of the court, issue an injunction.

It would seem to be a logical inference that had Bercu denied the accusations of the bar association and forced the complainant to prove the commission of the acts charged, the summary jurisdiction of the court under the Judiciary Law would be unavailable, and the bar association would not be a proper party to any action unless the provisions of Article 75a had been followed. It remains to be seen whether the court, in such a case, would deem itself empowered to

punish for a contempt, as allowed by the Judiciary Law, or would hold itself limited to the issuance of an injunction as provided by Article 75a, under which article the action must be brought.

It is only natural that this case, dealing as it does with a matter of much importance to lawyers, accountants, and businessmen, has received a great deal of attention. Recently, it was mentioned parenthetically in *Hermax Co. v. Commissioner,* 11 Tax Court No. 55, where the court ruled that the good faith of the taxpayer based on an erroneous opinion of an accountant on a tax matter was no defense, and questioned the accountant's authority to render this opinion.

The *Bercu* case has now gone to the Court of Appeals. It is unlikely that the Court of Appeals will disagree with the holding that there was an unauthorized practice of law. Whether it will reverse on the procedural question of noncompliance with Article 75a, however, is a closer question, but this ruling will also, in all probability, remain undisturbed.

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